Supreme Court, U.S.
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In The

Supreme Court of the United States

TAG INVESTMENTS, JAMES A. GRETTUM, CAROL A. GRETTUM, and JONATHAN T. GARAAS,

Petitioners,

v.

MATRIX PROPERTIES CORPORATION, a MINNESOTA CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of North Dakota

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The North Dakota Supreme Court issued its mandate on June 7, 2000, upholding a lower court's Judgment in equity ordering TAG Investments and James A. Grettum " . . . to specifically perform under the Option to Purchase dated October 14, 1996."

The lower court, with the approval of the North Dakota Supreme Court, has entered orders and subsequent judgments based on unprecedented post-judgment motions for monetary damages in a specific performance action in which a final judgment had been entered almost two years earlier. Neither the optionee, nor the lower court, identified the legal basis for the unprecedented award of "costs [$4,127.60]," "damages [$61,059.18 – after appeal]," and "attorney fees [$48,642.00]" [App. 21-22] two years after the final judgment had been entered. The post-judgment motion procedures sanctioned by the lower court, and approved by the North Dakota Supreme Court, denied TAG Investments and James A. Grettum of their right to proper pleadings notifying them of the issues of the lawsuit, discovery, trial of issues of fact, a jury trial, and a judicial decision based upon properly introduced evidence considered in light of the law – a violation of Due Process of Law.

In a companion case, with the approval of the North Dakota Supreme Court, the lower court has entered orders and judgments, without evidence, legal basis, or meaningful hearing, which resulted in: (a) a judicial taking 27 acres of land from the record title owner and unnamed party, Carol A. Grettum, based upon a judicial determination of payment by her receipt of a dishonored check for

QUESTIONS PRESENTED – Continued

$254,830.08; (b) a judicial taking of TAG Investments and Carol A. Grettum's statutory vendor's lien due to inadequate payment if the executory contract exists; (c) a judicial action depriving TAG Investments and Carol A. Grettum of a reasonable remedy to protect their contractual and statutory rights; and (d) a judicial monetary sanction against TAG Investments and its attorney, Jonathan T. Garaas, totaling $7,344.59 for merely asserting factual and legal truths.

The questions presented here are:

1. Does the Fourteenth Amendment prevent a State court from issuing a monetary judgment of both sanctions and claimed legal damages by unprecedented post-judgment motion that is made (a) without support of the North Dakota Rules of Civil Procedure, (b) without proper notice to litigants of the legal and factual basis for the motion, (c) without a trial of issues of fact, (d) without a judicial decision based upon properly introduced evidence considered in light of the law, (e) without support in statutory law or case law, and (f) without evidence of any damage?

2. Should the Supreme Court of the United States exercise its supervisory powers over the Supreme Court of North Dakota to protect Federally protected rights of freedom of contract?

3. Should the Supreme Court of the United States exercise its supervisory powers over the Supreme Court of North Dakota to prevent the denial to litigants of established adjudicatory procedure thereby depriving litigants

QUESTIONS PRESENTED – Continued

due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America?

4. Should the Supreme Court of the United States exercise its supervisory powers over the Supreme Court of North Dakota to prevent what is tantamount to spoliation of real property and contract rights by unprecedented judicial proceedings that deprive litigants of their real property and contract rights without full payment as envisioned by the underlying contract?

5. Should the Supreme Court of the United States exercise its supervisory powers over the Supreme Court of North Dakota because it has sanctioned the judicial divestment of litigant's real property when a litigant was not a party to the specific performance action, nor allowed to intervene in the specific performance action, nor paid any monies for the land the litigant owns?

6. Should the Supreme Court of the United States exercise its supervisory powers over the Supreme Court of North Dakota because it has sanctioned litigants and their counsel for advocating that neither the underlying contract, the law and rules of procedure of North Dakota, and the Fourteenth Amendment to the Constitution of the United States of America would allow what the North Dakota courts have done to James A. Grettum, Carol A. Grettum and TAG Investments?

7. Have statutes and rules of procedure been applied equally to Petitioners as required by the Fourteenth Amendment?

LIST OF ALL PARTIES TO THE PROCEEDING

A. List of Petitioners.

TAG Investments, a partnership consisting of James A. Grettum, R. Allan Rostad, Thomas Richards, P.O. Box 9121, Fargo, ND 58106;

James A. Grettum and Carol A. Grettum, husband and wife, of 4842 Rose Creek Parkway, Fargo, ND 58104;

Jonathan T. Garaas, Garaas Law Firm, who as attorney for the other petitioners was sanctioned along with TAG Investments and Carol A. Grettum for trying to assert federal constitutional rights on behalf of his clients.

B. List of Respondents.

Matrix Properties Corporation, a Minnesota Corporation, P.O. Box 1389, Fargo, ND 58107-1389.

C. Nominal Parties to the Quiet Title Action.

The caption to the quiet title action, one of the decisions that gives rise to this petition, lists J.C.G. Investments, L.L.C. (a North Dakota limited liability company consisting of James A. Grettum and Carol A. Grettum), Anderson and Grettum Partnership, and R. Allan Rostad, as an individual, and Thomas A. Richards as an individual. These parties to the quiet title action claimed no interest in the real property in their individual capacity and did not participate in the appeal to the Supreme Court of North Dakota. They were also represented by the Garaas Law Firm.

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PETITION FOR WRIT OF CERTIORARI

TAG Investments, James A. Grettum, Carol A. Grettum and Jonathan T. Garaas respectfully pray that a writ of certiorari issue to review three related judgments and opinions of the Supreme Court of North Dakota that deny Petitioners due process of law and equal protection of the law guaranteed to them by the Fourteenth Amendment to the Constitution of the United States of America.

OPINIONS BELOW

The first opinion that gives rise to this petition is *Matrix Properties Corporation v. TAG Investments*, 2002 ND 86, 644 N.W.2d 601. This case is reprinted in Appendix at page 1 through 20 and will sometimes be referred to as MATRIX IV. By order of June 5, 2002, the Supreme Court of North Dakota denied a petition for rehearing. Appendix page 100 ["App. 100"].

The second opinion that gives rise to this petition is *Matrix Properties v. J.C.G. Investments, L.L.C.*, 2002 ND 99, ____ N.W.2d ___. App. 24-25. By order of July 15, 2002, the Supreme Court of North Dakota denied a petition for rehearing. App. 102. This case will be referred to as MATRIX V.

The third opinion that gives rise to this petition is *Matrix Properties Corporation v. TAG Investments*, 2002 ND 119, ___ N.W.2d ___. App. 39-41. This opinion was issued on July 16, 2002, by the Supreme Court of North Dakota and no petition for rehearing was made by petitioners. This case will sometimes be called MATRIX VI.

The first and third opinions that give rise to this petition stem from post-judgment proceedings in a specific performance action of an Option to Purchase dated October 14, 1996. App 334-351. Other Supreme Court decisions concerning this specific performance action are *Matrix Properties Corp. v. Tag Investments*, 2000 ND 88, 609 N.W.2d 737 (App. 51-64, and called MATRIX I); *Matrix Properties Corp. v. TAG Investments*, 2000 ND 213, 622 N.W.2d 432 (App. 67-68, and called MATRIX II); and *Matrix Properties Corp. v. TAG Investments*, 2001 ND 128, 636 N.W.2d 674 (App. 69-70, and called MATRIX III).

BASIS FOR JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). Pursuant to Supreme Court Rule 13.1, this petition is filed within 90 days of the denial of the petitions for rehearing by the Supreme Court of North Dakota for the first two opinions subject to this petition – June 5, 2002 and July 15, 2002, respectively. App. 100, 102. The third opinion sought to be reviewed was decided by the Supreme Court of North Dakota on July 16, 2002, and this petition is made within 90 days of said decision.

The federal constitutional rights denied Petitioners were raised in the District Court and the Supreme Court of North Dakota in various post-judgment proceedings. App. 127-333. Among the federal authority relied upon by Petitioners in the appeals to the Supreme Court of North Dakota of the post-judgment damages awarded in the specific performance action were *Boddie v. Connecticut*, 401 U.S. 371 (1971) and *Logan v. Zimmerman Brush Co., et al.*, 455 U.S. 422 (1982). The Supreme Court of North

Dakota rejected Petitioners' federal claims without discussion.

The federal constitutional rights denied Petitioners were also raised in the quiet title action before the District Court in response to a summary judgment motion, and in a timely post-judgment motion to amend the judgment. Petitioners' constitutional rights to due process of law and equal protection of the law were raised in the appeal to the Supreme Court of North Dakota. The North Dakota Supreme Court determined that Petitioners TAG Investments, Carol A. Grettum and their attorney Jonathan T. Garaas were frivolous to assert such rights. App. 25.

CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED IN THIS PETITION

Article 14, § 1, of the Articles of Amendment to the Constitution of the United States of America states:

> All persons born or naturalized in the United States, and subject to the jurisdiction, thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

This petition brings into issue whether the protections of the following North Dakota statutes are being applied equally to the Petitioners:

North Dakota Century Code (N.D.C.C.) § 35-20-01:

35-20-01. Vendor's lien on real property for purchase authorized. One who sells real property has a special or vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise by the personal obligation of the buyer.

N.D.C.C. § 28-26-01 concerning attorney fees and is set out at App. 106.

N.D.C.C. § 28-05-07 concerning a Lis Pendens and is set out at App 106-107.

N.D.C.C. § 28-20-11 concerning when a judgment is notice to a purchaser is set out at App. 107.

N.D.C.C. § 47-14-05 concerning pre-judgment interest is set out at App. 110-111.

N.D.C.C. § 28-20-34 concerning post-judgment interest is set out at App. 108.

N.D.C.C. § 32-03-21 relating to damages for the "wrongful occupation" of real property is set out at App. 108.

N.D.C.C § 41-03-36(c) concerning the rights of an obligee when a check is dishonored by the obligor is set out at App. 109. The entire statute is found at App. 108-110.

This petition brings into issue whether the protections of the following North Dakota Rules of Civil Procedure (N.D.R.Civ.P.) have been denied Petitioners resulting in a denial of due process of law and a denial of equal protection of the law.

N.D.R.Civ.P. 6. App. 112-113.

N.D.R.Civ.P. 11(c). App. 113-116.

N.D.R.Civ.P. 52. App. 117-118.

N.D.R.Civ.P. 54(e). App. 118-120.

N.D.R.Civ.P. 59(j). App. 120-123.

N.D.R.Civ.P. 60. App. 123-125

N.D.R.Civ.P. 70. App. 125-126.

STATEMENT OF THE CASE

Petitioners assert, that in three related decisions and judgments, the Supreme Court of North Dakota has sanctioned a course of proceedings in the lower District Court that has deprived them of due process of law and equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States of America. Although, a cursory review of the decisions that are the subject of this petition might lead a reader to believe that Petitioners are recalcitrant litigators, Petitioners state their positions in the North Dakota court system were designed to preserve their federally protected rights of freedom of contract, due process in court under the same procedures as afforded other litigants, and equal protection of the law.

To understand this Petition, the following case history is provided:

A. MATRIX I: the first appeal from the original Judgment of November 2, 1999.

The three judgments and opinions, subject to this Petition, stem from an Option to Purchase dated October 14, 1996, relating to 114 acres of real property in Fargo, North Dakota, between TAG Investments ("TAG") to

Matrix Properties Corporation ("Matrix"), then known as E.W. Wylie Corporation. App. 334. At the time the option was entered into, TAG did not own any of the real property but had option to purchase rights with the Clapp Family Trust, then record-title owner. See paragraph 8 of the Option to Purchase. App. 339. After the Option to Purchase was executed, TAG purchased only 51 acres of the possible 114 acres of land that was subject to the option.

By the terms of the option, Matrix was required to purchase 20 acres by June 1, 1999. App. 337. On May 26, 1999, Matrix gave notice to TAG that it was going to purchase the south 21.82 acres of the second tract of land – then owned by TAG. App. 53. Because TAG was not paid for at least 20 acres by June 1, 1999, (App. 337) TAG believed it was free of any obligations under the option to purchase. On June 22, 1999, TAG conveyed the 21.82 acres sought by Matrix in its initial exercise to James A. Grettum. James A. Grettum closed with Matrix on the 21.82 acres on June 28, 1999. After the closing, each had a different view of the effectiveness of the option to purchase. App. 54-55.

After the closing of June 28, 1999, the Clapp Family Trust deeded James A. Grettum the remaining 27 acres of the second tract of land without TAG acquiring any interest. Matrix gave notice to TAG and Grettum on July 1 and 2, 1999, respectively, of its intent to purchase the remaining portion of the real property. App. 55. On July 6, 1999, both TAG and James A. Grettum responded by letter indicating that they were free of further obligations under the option to purchase. App. 55.

On July 9, 1999, Matrix initiated a lawsuit against TAG and James A. Grettum. After TAG and James A.

Grettum answered, Matrix immediately moved for summary judgment on a single issue. As can be seen from the Memorandum Opinion of Judge Erickson, the last fact (in terms of date) submitted or relied upon in the summary judgment was the July 6, 1999, response of TAG and James A. Grettum to the July 1 and 2, 1999, notices from Matrix. App. 71-99.

The sole issue in the summary judgment motion was whether the June 28, 1999, closing with James A. Grettum had fulfilled Matrix's obligation to purchase 20 acres of land by June 1, 1999, to keep the option alive. Matrix did not submit any evidence of any attempted tender of performance concerning the July 1 and 2, 1999, letters to TAG and James A. Grettum. Matrix did not even present any evidence that it had any money on hand to close with respect to the July, 1999, notices. In its brief supporting its motion for summary judgment, the position of Matrix concerning the role of James A. Grettum was limited:

> To the extent that TAG has further transferred Option Property to Grettum, Grettum is obligated to convey the property to E.W. Wylie because he took the property subject to E.W. Wylie's rights under the Option Agreement. *Bangen v. Bartelson*, 553 N.W.2d 754, 758 (N.D. 1996).

Summary judgment was issued in favor of Matrix in that the lower court determined the June 28, 1999, closing with full payment within 45 days satisfied the obligation of Matrix to purchase 20 acres by June 1, 1999. On November 2, 1999, Judgment was issued decreeing in pertinent part: "Defendants' [sic] are ordered to specifically perform under the Option to Purchase dated October 14, 1996." App. 104. The lower court did not retain jurisdiction in the judgment.

On November 2, 1999, TAG and James A. Grettum appealed the November 2, 1999, Judgment to the Supreme Court of North Dakota resulting in the decision of *Matrix Properties Corporation vs. TAG Investments*, 2000 ND 88, 622 N.W.2d 432. Said decision affirmed the summary judgment of the lower court without remand other than to assess the presumed costs of the appeal of $75.00.

Neither TAG nor James A. Grettum sought a stay during the first appeal. One attempted closing by Matrix in December, 1999, was rejected by TAG as a counteroffer. Among other matters of deviation, Matrix had demanded more land to be conveyed to it than the option agreement provided. Although Matrix attempted to have TAG and James A. Grettum found in contempt because of an anticipated rejection, the lower court would not find said parties in contempt. No other attempt to close was made by Matrix while the first appeal was pending.

While the first appeal was pending, James A. Grettum quit claimed the north 27 acres of the second tract (the land he had received directly from the Clapp Family Trust) to his wife, Carol A. Grettum. The quit claim deed was dated in January, 2000, and placed of record in May, 2000. The quit claim deed trailed a post-judgment lis pendens placed of record in December, 1999, by Matrix. While the first appeal was pending, James A. Grettum felt compelled to transfer the 27 acres to his wife to preserve the family's estate, and to clearly delineate his separate duty under paragraph 11 of the option, as a previous optionee, with the duty he has under paragraph 8 of the option, as a grantee of the Clapp Family Trust. App. 339-340, 341. Under N.D.C.C. § 47-10-23.1, a nontestamentary transfer of real property between spouses is conclusively presumed

to be for consideration (unless stated in writing otherwise at the time of the transfer).

B. MATRIX II: the second appeal.

On June 7, 2000, the MATRIX I mandate of the Supreme Court of North Dakota was issued. It is after the mandate was issued in the first appeal, that TAG, James A. Grettum, Carol A. Grettum and their attorney, Jonathan T. Garaas, assert that their federal rights to due process of law and equal protection of the law were denied and violated by the North Dakota courts in a series of post-judgment motions, and a quiet title action, that ultimately lead to the decisions sought to be reviewed by this Petition.

On June 2, 2000, Matrix proposed a new closing for June 21, 2000. At this time, TAG believed that the July 1 and 2, 1999, notices were ineffective due to the rejected December, 1999, counteroffer during the first appeal, and more than 45 days had passed since the notice of entry of the November 2, 1999, Judgment. Further, since the option agreement required at least *40 acres* to be "purchased" (App. 337) by June 1, 2000, and payment of option monies on February 28 of each year for land not "purchased" the previous year based on a formula of land "not yet been deeded" (App. 337-339), TAG inquired of Matrix of its position on said option provisions and gave notice that February 28 option monies were delinquent. App. 166. Matrix responded by bringing a motion on nine days mailed notice (at the time, N.D.R.Civ.P. 6 required 14 days notice plus 3 days for mailing) asking that the lower court declare that Matrix had no requirement to pay the option monies that had been due in February, 2000. While this

motion was pending, the City of Fargo, North Dakota experienced a natural disaster (massive rainfall) inundating Grettum's office and the Garaas Law Firm's office with six feet of sewage – exasperating the shortened notice.

The post-judgment motion of Matrix resulted in the lower court's Order of June 26, 2000, which held the February option monies did not need to be paid because " . . . Plaintiff's valid and timely exercise of the option in July 1999 created a binding executory contract for the purchase and sale of real property as found by prior Order of this Court." App. 65-66.

The Order of June 26, 2000, was appealed by TAG and James A. Grettum because they believed: (a) the lower court no longer had jurisdiction because there was no remand other than to assess costs of appeal; (b) there was no prior finding in either the November 2, 1999, Judgment or the Memorandum Opinion of October 27, 1999, that expressly held that the July, 1999, notices created a binding executory contract, and the order amends the final judgment contrary to the rules of civil procedure; (c) based upon the terms of the option agreement, the February, 2000 option monies were due even if there was an executory contract because the word "purchased" contemplated a completed contract; and (d) their right to due process was violated based upon the shortened notice, the claimed amendment of a final judgment, and a belief that Matrix must present the issue in a new lawsuit – not a post-judgment motion unsupported by evidence.

On December 12, 2000, the Supreme Court of North Dakota, summarily affirmed the June 26, 2000, Order (MATRIX II) and TAG and James A. Grettum were determined to be frivolous to expect contractual option monies

to be paid after the November 2, 1999, Judgment. Double costs for the appeal (presumptively $150.00) were awarded to Matrix. Although not an issue of the second appeal, the Supreme Court of North Dakota inexplicably modified the remedy afforded Matrix by the November 2, 1999, Judgment (supposedly "final") so as to provide the following order:

> We further direct the district court to order specific performance requiring TAG and Grettum to convey the subject property upon tender by Matrix of the purchase price set in the 1996 option agreement.

App. 68.

Believing the Supreme Court of North Dakota misidentified the issues on appeal, TAG and James A. Grettum timely petitioned the Supreme Court of North Dakota for rehearing which was denied on February 5, 2001.

C. Court proceedings during second appeal.

The second appeal was pending in the Supreme Court of North Dakota from the Notice of Appeal dated July 3, 2000, until the issuance of the mandate on February 19, 2001. No party sought a stay during the second appeal.

In early July, 2000, Matrix moved the lower court to require TAG and James A. Grettum to provide deeds for the real property, or alternatively, declaring the judicial transfer of the property. Matrix's motion of July, 2000, set forth the novel concept that all of the proceeds of the closing would be first used to exercise the underlying Option to Purchase with the Clapp Family Trust (not part of the prior litigation) and all remaining proceeds were to

be held by the court pending resolution of a subsequent motion to be made by Matrix for damages and attorney fees. TAG and James A. Grettum responded to said motion claiming, in part, it was inconsistent with the contract and Judgment. Because of the second appeal, the lower court declined to hear the July, 2000, motion made by Matrix.

Because of the lower court's declination to entertain the July 2000, motion, Matrix brought a Motion for Supervisory Writ before the Supreme Court of North Dakota asking the Supreme Court of North Dakota to rule that the lower court could enforce the November 2, 1999, Judgment despite the second appeal. The Supreme Court of North Dakota denied Matrix's motion, but indicated that the lower court retained jurisdiction to enforce a judgment when no stay pending appeal had been granted. App. 4.

On October 23, 2000, Matrix brought a Motion for an Order Compelling Defendants to Provide Deeds to Plaintiff, or Alternatively, Declaring the Judicial Transfer of Property to Plaintiff. Matrix's motion was not supported by any evidence. As set forth in the Brief of Matrix in support of its motion, the following was requested of the lower court:

> "Plaintiff also seeks an Order placing the proceeds of the purchase into the Court. These funds will first be used to exercise the Underlying Option [meaning TAG's option with the Clapp Family Trust], and second to be held by the Court pending resolution of Plaintiff's motion for damages and attorneys' fees. These damages and fees will include not only reimbursement for the damages from the delay in transferring the property from July 1, 1999, to the time of transfer,

> but will also include any fees and costs incurred in clearing up the title interests of the Clapp Land Trust, JCG Investments, L.L.C., Anderson and Grettum Investments, a partnership under the laws of the State of North Dakota, R. Allan Rostad, individually, and Thomas Richard, individually. Any remaining funds would be paid to defendants or their designated intermediary."

The October 24, 2000, motion was resisted by TAG and James A. Grettum with a comprehensive affidavit from James A. Grettum setting forth their position that (a) Matrix was not enforcing the Judgment, but attempting to amend it, and (b) that Matrix was not following the Option to Purchase, and was in default. TAG and James A. Grettum's position, which essentially remained unchanged since the entry of the November 2, 1999, Judgment was that if the option agreement was in effect that they would honor it, but they would reject any deviation from its terms. James A. Grettum advocated that his sole responsibility under the Judgment, and the option agreement, was to provide a quit claim deed, as a previous optionee, under paragraph 11 of the option agreement. App. 341. TAG advocated that if a contract to sell was formed by the initiation of the lawsuit, then TAG's duties to Matrix were limited by provisions in paragraph 13 of the option:

> If TAG agrees to attempt to cure the defects, TAG shall use due diligence in the effort to do so. If TAG does not undertake to make the title good and marketable and/or acceptable or is unable to make the title good and marketable and/or acceptable within such reasonable time as granted by WYLIE, it shall be at the option of WYLIE to accept the title in its existing condition with no further obligation on the part of TAG to correct any defect or again have the right to declare its

> exercise of the Option Agreement void as to the Individual Parcel selected or to declare the entire Option Agreement void.

App. 343.

TAG advocated that the words "no obligation" meant that TAG had no financial obligation to correct its title. TAG advocated that it had no financial obligation to pay for and obtain title from either the Clapp Family Trust, the record title owner of the first tract, or Carol A. Grettum, then record title owner of the second tract. When TAG's interest in the underlying option terminates, the Clapp Family Trust, or any one standing in the shoes of the Clapp Family Trust, has the obligation to convey to Matrix under the same terms stated in Matrix's option agreement with TAG. See paragraph 8 of the Option to Purchase at App. 339-340.

TAG advocated that if a contract to sell exists, TAG is entitled to statutory interest on its contract. TAG submitted that if a contract to sell was created, and Matrix did not want to accept, nor perform, the contract that was formed, Matrix had either abandoned the contract to sell or forfeited its right to specific performance. TAG submitted that it should be relieved of its judgment burden due to Matrix's noncompliance with the Option to Purchase.

On November 7, 2000, the lower court determined that it did not need to consider any fact because it was a post-judgment motion, and therefore, the lower court refused to consider the unchallenged facts, submitted by TAG and James A. Grettum, establishing Matrix's noncompliance with the Option to Purchase. On November 8, 2000, the lower court ordered both TAG and James A. Grettum to execute a warranty and quit claim deed, and

obtain quit claim deeds from non-parties, and deliver all of the deeds to Matrix on November 15, 2000. The order of November 8, 2000, further provided "There being no just reason for delay, **LET JUDGMENT BE ENTERED ACCORDINGLY FORTHWITH.**" On November 15, 2000, only hours before the ordered time for delivery of the deeds, Matrix served the attorneys for TAG and James A. Grettum with the order. No judgment has ever been entered pursuant to said order of November, 2000.

Because of the amendment of the judgment while on appeal and the unprecedented legal position taken by the lower court that a factual hearing was not necessary to resolve facts that occurred subsequent to November 2, 1999 – the date of the original Judgment, now supposedly final – TAG and Grettum sought a Supervisory Writ from the Supreme Court of North Dakota, which was denied without comment. For this reason, TAG and Grettum believed it was necessary to attempt to have the United States District Court assume jurisdiction in an attempt to protect themselves from their perceived violations of due process of law, equal protection of law, and other civil rights. TAG and Grettum' s petition for removal to Federal Court was denied, orally, on December 15, 2000, shortly after the Supreme Court of North Dakota's decision of December 12, 2000, in MATRIX II.

After federal removal was denied on December 15, 2000, TAG and James A. Grettum appealed the November 8, 2000, order (that still had not been reduced to the amended judgment) to the Supreme Court of North Dakota.

On December 15, 2000, only hours after the federal judge orally denied removal, TAG and James A. Grettum

were faced with a proceeding in the State of North Dakota's lower court. During said proceeding, District Judge Frank Racek informed the parties: "As to the Carol Grettum property. You are going to have to commence an action against her because I can't order her to do anything." Transcript of Hearing of December 15, 2000, at page 29, line 25, to page 30, line 2.

On January 2, 2001, a pre-motion status conference was held without any prior indication to TAG or James A. Grettum as to the reason for the pre-motion status conference. On January 2, 2001, the State's lower court judge again informed Matrix of his position concerning Carol A. Grettum's interest in the north 27 acres of Tract 2: "the third piece, Carol Grettum, the Court is not going to do anything for you unless you get her in front of the Court somehow." Transcript of Proceeding of January 2, 2001, at page 17, lines 6 through 8.

On January 5, 2001, the lower court did not follow through with what had earlier been verbally stated would occur. On January 5, 2001 (before the mandate stemming from the December 12, 2000, Supreme Court decision of MATRIX II was issued, and without a fact-finding hearing), the lower court ordered a conveyance that included a judicial transfer of non-party Carol A. Grettum's land (27 acres) and an abatement of the purchase price to TAG ($202,872) so the obligation of payment to obtain the Clapp Family Trust title fell upon TAG – not Matrix. The lower court, without comment, explanation or findings, did not require Matrix to pay interest on the purchase price (statutorily fixed at 6%, or 12% if by judgment). On January 5, 2001, Matrix tendered three separate personal checks, but the mode of payment and the amount of payment were rejected by TAG through its attorney.

Despite the objection to the personal checks, the lower court ordered Matrix to send, by mail, the three personal checks to TAG's attorneys. One of the checks sent is Matrix's personal check in the amount of $254,830.58 made payable to TAG, James A. Grettum and Carol A. Grettum.

Judge Racek, the lower court judge issuing the January 5, 2001, Order, recused himself for being biased *for events occurring on January 2, 2001, and earlier,* and the matter was assigned to Judge Georgia Dawson. Intending to appeal the January 5, 2001, Order, and not wanting to be found accepting the benefit of the Order, TAG and James A. Grettum brought a motion asking Judge Dawson to have the checks issued by Matrix on January 5, 2001, placed with the lower court in an interest-bearing account. The motion was denied, even though not resisted by Matrix. TAG and James A. Grettum further moved to have all orders issued by the recused judge vacated because of lack of jurisdiction. This motion was denied by Judge Dawson.

On February 7, 2001, The Supreme Court of North Dakota dismissed the appeal from the lower court's order of November 8, 2000, in that it was an order for judgment, and accordingly interlocutory, and not appealable in the absence of entry of the amended judgment.

D. MATRIX III: an appeal of the January 5, 2001, Order.

TAG appealed the January 5, 2001, Order presenting several issues on appeal. The first issue presented by TAG and James A. Grettum was that the lower court did not have jurisdiction to amend the November 2, 1999, Judgment

while the appeal was pending (MATRIX II), and without an evidentiary hearing as to post-judgment facts. TAG and James A. Grettum claimed the order deviated from the terms of the Option to Purchase and the Supreme Court of North Dakota's prior decisions and mandates, in many respects, including the following:

1. The 45 day "time of the essence rule" was obliterated.

2. The parties were different. The Order of January 5, 2001, included Carol A. Grettum without proper amendment of pleadings, and without proper service of any notice to her.

3. James A. Grettum's involvement in the initial Judgment was merely to give a quit claim deed only based upon his option rights existing prior to October 14, 1996. The original Judgment did not require him to convey the real property interest he later received directly from the Clapp Family Trust and conveyed to Carol A. Grettum post-judgment.

4. The decision of December 12, 2000, required a tender by Matrix – not the proffered conditional tender of the personal check in an insufficient amount.

In said appeal TAG and James A. Grettum asserted that they were denied due process of law because the lower court refused to consider any post-judgment fact presented to it by TAG and Grettum. Citing *Powell v. State of Alabama*, 287 U.S. 45 (1932), TAG and James A. Grettum claimed the lower court acted arbitrarily when it issued the January 5, 2001, Order without an evidentiary hearing as to post-judgment facts. TAG and James A. Grettum argued that they were denied equal protection of

the law and access to the court for its refusal (a) to hear uncontroverted post-November 2, 1999, facts presented by TAG and James A. Grettum, (b) to follow clear contractual terms, or (c) giving TAG the benefit of certain North Dakota statutes such as being paid interest on the purchase price.

Citing case law from other states, such as *Shallow Brook Associate v. Dube*, 599 A.2d 132 (N.H. 1991), TAG argued in said appeal, that it should be relieved of its obligations under the November 2, 1999 Judgment because Matrix did not timely and unconditionally tender performance. In said appeal, TAG informed the Supreme Court of North Dakota of case law from other states, such as *Bellamah v. Schmider*, 360 P.2d 656 (N.M. 1961), that the purchase price should not have been abated because Matrix knew that TAG did not have full title when it initiated its lawsuit.

Despite each issue raised in the appeal by TAG and James A. Grettum having support in post-judgment facts, North Dakota statutory law and North Dakota case law, or case law from other jurisdictions, the Supreme Court of North Dakota, on July 13, 2001, summarily affirmed the January 5, 2001, Order finding the appeal frivolous and determined by the prior two appeals and assessed double costs (presumed $150.00). MATRIX III; App. 70. A timely petition for rehearing was denied on September 4, 2001.

E. MATRIX IV: Matrix's post-judgment motion for damages.

In March, 2001, Matrix brought a post-judgment motion for damages "caused by defendants refusal to convey property." The motion did not identify the rule or

statute upon which it was based. The motion was supported factually by only the affidavit of Matrix's attorney, Sidney J. Spaeth, setting forth attorney fees, costs and expenses Matrix had incurred post-November 2, 1999, and copies of various post-judgment documents, including letters, opinions, orders, and Defendants' payment calculations.

The motion was supported by a legal brief claiming damages for the "delay in the transfer of the property from August 15, 1999, to January 4, 2001." Matrix cited N.D.C.C. § 32-03-21 as the statutory authority for its motion for its claim of damages, post-judgment expenses and post-judgment costs. Matrix did not present any factual basis for its claimed damages. Matrix's position was that since TAG had sought statutory interest on the purchase price, Matrix should have statutory interest on the liquidated value of the land set forth in the option contract from August 14, 1999 (the date Matrix claimed the closing should have occurred) to January 4, 2001.

In the motion, Matrix sought all post-judgment attorney fees from May 5, 2000 to the date of the motion in March 2001. The attorney fees Matrix sought included its attorney fees for the second appeal (MATRIX II) and its denied request for a supervisory writ even though the mandate did not authorize the attorneys fees. Matrix's claimed basis for the attorneys fees was N.D.C.C. § 28-26-01.

TAG's position was: (a) there was no procedural or statutory basis for the motion to amend the November 2, 1999, specific performance Judgment to include damages; (b) Matrix was not entitled to damages because the earliest that Matrix could claim even a conditional tender was

January 5, 2001, and under the option contract TAG was entitled to possession until paid; (c) under N.D.C.C. § 32-03-21, if Matrix was entitled to damages it would be rentals offset by interest on the unpaid purchase price; and (d) all four mandatory elements of N.D.C.C. § 28-26-01(2) were missing in the post-judgment motions.

The hearing on the motion was postponed because of the pending appeal of the January 5, 2001, Order. After the Supreme Court of North Dakota summarily affirmed the appeal from the January 5, 2001, Order (MATRIX III), Matrix renewed and amended its motion for damages. Even though the mandate of the Supreme Court of North Dakota authorized only double costs for the appeal of the January 5, 2001, Order, Matrix amended its motion to request the attorney fees incurred by Matrix for said appeal.

A motion hearing was held on August 27, 2001, before Judge Dawson. Matrix presented no evidentiary facts for its claimed damages stemming from the claimed delay, offering only the musings of its attorney, Sidney J. Spaeth. Attorney Spaeth stated in part, "Defendants' [sic] contend that it's [sic] farm land; that is wrong. This is development property, damages are measured by the delay in the development of the property." Transcript of Hearing of August 27, 2001, at page 6.

After listening to the arguments of both counsel, Judge Dawson awarded Matrix all of the damages, costs, expenses and attorneys fees Matrix had requested. TAG and James A. Grettum, through their attorneys, asked Judge Dawson if she could identify the statutory and legal basis for her decision. Judge Dawson replied, "No." App. 208-209. When asked if the judge was just unwilling to

answer or if there was not a basis for her decision, Judge Dawson did not identify the legal basis for her decision, but elaborated in part, "Well, we'll call it the press of business – whatever you want to call it." App. 209.

On August 27, 2001, without findings of fact, Judge Dawson signed a post-judgment order authorizing the entry of a monetary judgment totaling $188,636.79. App. 21. The post-judgment monetary judgment was entered on September 11, 2001. App. 23. TAG and James A. Grettum timely appealed said judgment to the Supreme Court of North Dakota. TAG and James A. Grettum argued that the award of damages was based on a mere fiction because Matrix had not performed, or even tendered performance, on August 15, 1999. TAG and James A. Grettum contended that the September 11, 2001, Judgment was an unprecedented post-judgment monetary judgment entered without proper pleadings, trial, evidence, factual findings, legal conclusions and jurisdiction, all in violation of TAG and James A. Grettum's right to due process of law, and was void. App. 6.

This appeal resulted in MATRIX IV. App. 1-20. In paragraph 26 of MATRIX IV (App. 14), the Supreme Court of North Dakota determines that it is the law of the case that Matrix unconditionally complied with the option and made reference to paragraphs 1, 14-18 of the first appellate decision (MATRIX I). App. 51-64. These referenced paragraphs refer to the exercise of twenty acres by Matrix in May, 1999, with a June, 1999, closing and do not refer to the subsequent exercise of July, 1999, by Matrix which has never been the subject of any judicial scrutiny. App. 57-59.

When read together, paragraphs 14 and 16 of the subject Option to Purchase clearly provide that TAG has possession until fully paid at closing. App. 343-345. Despite such contract provisions, the Supreme Court of North Dakota – not the trial court – factually determined that TAG's occupation was an "unlawful possession" after August 15, 1999, even though the earliest that Matrix could claim that TAG had been paid any monies was January 5, 2001. App. 17.

Although reducing the amount of the judgment, the Supreme Court of North Dakota determined that jurisdiction to enter the monetary judgment for costs, attorney fees, and legal damages was proper under the court's ancillary jurisdiction to enforce the November 2, 1999, Judgment and N.D.R.Civ.P. 70. App. 12.

F. MATRIX V: the quieting title action.

In April, 2001, without naming TAG, James A. Grettum, or Carol A. Grettum, Matrix initiated a quieting title action against the entities and individuals who had promised, in paragraph 11 of the underlying option, to quit claim their interest as previous optionees. Matrix also named persons unknown as additional defendants. See caption; App. 26.

At the time the quieting title action was started, none of Matrix's three checks issued on January 5, 2001, had been cashed by TAG. TAG could not cash said checks because of its pending appeal from the January 5, 2000 Order.

Believing the quieting title action premature, TAG and Carol A. Grettum answered as "unnamed" defendants

along with the named defendants. TAG and Carol A. Grettum asserted the January 5, 2001, Order was void, or voidable, and that an order could not be used as a root in a chain of title and did not vest any real property in Matrix. TAG and Carol A. Grettum asserted that if the January 5, 2001, Order was not void or voidable, they had at least a vendor's lien until fully paid under N.D.C.C. § 35-20-01.

In July, 2001, after the January 5, 2001, Order was summarily affirmed by the Supreme Court of North Dakota (MATRIX III), TAG cashed two of the three checks sent to it from the January 5, 2001, proceeding. The $254,830.58 made payable to TAG, James A. Grettum and Carol A. Grettum was not cashed.

On September 25, 2001, Matrix moved for summary judgment against TAG and Carol A. Grettum coupled with Rule 11 motion for sanctions "based upon defendants' assertion of right, title and interest to the property subject to this action, even though defendants can assert no right, title or claim to real property through any evidence or valid legal claim . . . "

Resisting the motion, TAG submitted the affidavit of its partner, James A. Grettum, stating TAG has only been partially paid. Carol A. Grettum submitted her affidavit that she had not been paid any monies for her land. Carol A. Grettum was then record title owner of 27 acres. Resisting summary judgment, both TAG and Carol A. Grettum relied on the North Dakota case of *Wagner v. Stroh*, 294 N.W. 195 (N.D. 1940) which held that a court of equity would not entertain a vendee's quiet title action against his vendor until the vendor is paid. TAG and Carol A. Grettum further asserted that the January 5, 2001, Order would not support a claim of *res judicata* because it was an

order made without hearing and factual findings, and Carol A. Grettum was not a party to the specific performance action.

During oral arguments, Matrix, through its attorney, acknowledged that it had stopped payment on the $254,830.58 check. App. 211-212. Despite Matrix's concession, the lower court issued summary judgment and specifically held that Carol A. Grettum had been paid by Matrix's dishonored check. App. 30. When ordering summary judgment, the lower court, without invitation of any party and without notice to any party, took judicial notice of the specific performance action – but making errors in the recitation of the other case.

Despite Matrix's admission that the $254,830.58 check had been dishonored, the lower court sanctioned TAG and its attorney for submitting a defense to the summary judgment motion and shifted all attorney fees and costs incurred by Matrix in the quiet title action to them. App. 31, 33.

The lower court, not adopting Matrix's expressed position for Rule 11 sanctions, misstated a paragraph in the Answer, and assessed attorney fees without affording TAG or its legal counsel, Jonathan T. Garaas, an opportunity to explain the questioned paragraph of the Answer.

A timely Motion to Alter, Amend, or Vacate the Judgment of November 14, 2001 was made and denied. TAG, Carol A. Grettum and their attorney submitted, in part, that the Judgment was contrary to the Due Process and Equal Protection rights guaranteed by the Fourteenth Amendment to the Constitution of the United States of America. App. 293-316; argument also made to lower court. Legal counsel Jonathan T. Garaas and TAG complained that

they did not get a fair hearing on the sanctions. App. 293-316. Petitioners supported their post-judgment motion with Matrix's position in the specific performance action wherein Matrix said that Carol A. Grettum was not intended to be paid by Matrix when it issued the check for $254,830.58. The lower court denied Petitioners' post-judgment motions. App. 37-38.

All Petitioners, herein, timely appealed the Judgment and post-judgment order to the Supreme Court of North Dakota, raising among other matters, the constitutional issues presented herein. Despite knowledge of the dishonored check of $254,830.58, the Supreme Court of North Dakota determined Petitioners' appeal was frivolous and assessed attorney fees for the appeal against them in the amount of $5,000.00. The appellate decision holds, without explanation, that under the facts of the case TAG and Carol A. Grettum do not have a vendor's lien. App. 25.

G. The Third Judgment in the specific performance action.

After Matrix obtained the post-judgment monetary judgment of $188,636.79, it stopped payment on the $254,830.58 check. Matrix then brought a motion to offset the September 11, 2001, Judgment with an implicit, and unknown, monetary judgment for about $880,000 obtained by Defendants on November 2, 1999. App. 223. TAG and James A. Grettum resisted the motion asserting, in part, that the September 11, 2001, monetary judgment was void. App. 225. TAG further asserted that it was entitled to statutory interest on the implicit November 2, 1999, Judgment, as revisited by the Supreme Court of North Dakota on December 12, 2000 (MATRIX II). App. 226.

Carol A. Grettum, after the judge in the quieting title action told her that she had been paid by the dishonored check, moved to intervene and direct the $254,830.58 payment to her. The lower court denied Carol A.Grettum the right to intervene. App. 42-43. On November 27, 2001, the lower court ordered offset determining Matrix need only pay TAG. App. 42-43. Subsequent to said order, under the guise of entering a cost judgment of $450.00 in favor of Matrix (stemming from the prior appeals), the lower court, without further proceedings to TAG, authorized a third judgment by post-it note in the singular specific performance action. App. 44. The third judgment in the singular case raised the January 5, 2001, Order to judgment status. App. 45.

TAG and Grettum appealed from the order of offset and the third judgment. TAG and Grettum again asserted that the September 11, 2001, monetary judgment was issued without due process of law and is void. The Supreme Court summarily affirmed the order and judgment without discussion of the constitutional issues. (MATRIX VI.) App. 40.

H. Application of the Fourteenth Amendment.

The basic elements of due process of law include a court having jurisdiction, reasonable notice to the parties, and a meaningful opportunity to be heard. It is respectfully submitted that all three elements were missing when the September 11, 2001, Judgment was entered. A court's jurisdiction in a specific performance action is limited by the Fourteenth Amendment. No court has the province, when specifically enforcing a contract, to alter the clear

terms of that contract. *Biteler's Tower Service v. Guderian*, 466 N.W.2d 141, 144 (N.D. 1991). In this case, the underlying option agreement clearly provided that TAG would have possession until paid. App. 345. Yet the Supreme Court of North Dakota altered the contract, and made factual findings of an unlawful possession by TAG. App. 17. The lower court – the court that should find facts – did not make a factual finding that TAG's possession was unlawful. App. 21-22. MATRIX IV and MATRIX VI establish that TAG had not been fully paid. App. 19, 20 and 40. Petitioners are denied due process of law and equal protection when damages are based upon appellate factual findings (not the trial court's findings) that TAG's possession until January 5, 2001 was unlawful when the underlying contract allows TAG possession until fully paid. Due process of law is denied a litigant by invoking a "law of the case" argument when the judicial record establishes that factual matters that are claimed under said doctrine **were never litigated.**

Protections found in the North Dakota Rules of Civil Procedure have been denied Petitioners. Under certain circumstances, N.D.R.Civ.P. 70 authorizes "costs" but does not authorize attorney fees and expenses, nor legal damages. Said rule cannot be used as the basis for an unprecedented post-judgment motion for money damages in a specific performance action made without proper pleadings, discovery, trial, and judicial decisions based upon the evidentiary record. The monetary judgment amends the November 2, 1999, Judgment (App. 104); is inconsistent with N.D.R.Civ.P 52, 59 and 60, and due process of law; and should be considered void. *Cokins v. Frandsen*, 136 N.W.2d 377 (N.D. 1965).

The North Dakota courts took Carol A. Grettum's real property while claiming she has been paid by a dishonored check. Not only has Carol A. Grettum been denied payment, she has been denied rights to enforce payment through a statutory vendor's lien as well as her day in court to protect her property. Upon delivery of a deed, a grantee no longer has privity with her grantor. *Bismarck Public School District No. 1 v. Hirsch*, 136 N.W.2d 449 (N.D. 1965). *Postal Telegraph Cable Company v. City of Newport, Kentucky*, 247 U.S. 464, 474-475 (1918). Although Carol A. Grettum may be bound by MATRIX I, she should not have been bound by the January 5, 2001, Order because she was not made a party to the specific performance action, and she was denied intervention. None of the Petitioners should have been sanctioned for advocating due process rights expressed in the North Dakota Rules of Civil Procedure and statutes.

REASONS FOR GRANTING THE WRIT

The North Dakota Supreme Court, and its inferior courts, have failed to remember the role of the judiciary announced in *Baltimore & Ohio Southwestern Railway Company v. Voigt*, 176 U.S. 498, 505 (1900) that "the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts . . . " After establishing an adjudicatory procedure presumptively complying with the Due Process Clause of the Fourteenth Amendment, the North Dakota courts denied Petitioners' basic rights in unprecedented procedures and took away real property and contract rights from Petitioners.

The procedures implemented by the North Dakota courts are in direct conflict with the protections of the Fourteenth Amendment and the civil rights of Petitioners whose real property, monies, and contract rights have been judicially taken by actions tantamount to spoliation. When voicing objection, Petitioners, and their attorney, have been sanctioned without a fair hearing, nor legal or factual basis, in order to keep them quiet.

Certiorari is appropriate to restore the Rule of Law in North Dakota, or in any other jurisdiction that seeks to exceed its authority to benefit a favored party.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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No. _____

In The
Supreme Court of the United States

TAG INVESTMENTS, JAMES A. GRETTUM,
CAROL A. GRETTUM, and JONATHAN T. GARAAS,

Petitioners,

v.

MATRIX PROPERTIES CORPORATION,
a MINNESOTA CORPORATION,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court Of North Dakota

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME I, PAGES 1 TO 170

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Filed 5/17/02 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2002 ND 86

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation, Plaintiff and Appellee

v.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota, Defendants and Appellants

No. 20010228

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Georgia Dawson, Judge.

AFFIRMED, MODIFIED AND REMANDED.

Opinion of the Court by Maring, Justice.

Sidney J. Spaeth, Vogel, Weir, Hunke & McCormick, Ltd., P.O. Box 1389, Fargo, N.D. 58107-1389, for plaintiff and appellee.

Jonathan T. Garaas, Garaas Law Firm, DeMores Office Park, 1314 23rd Street South, Fargo, N.D. 58103-3796, for defendants and appellants.

Matrix Properties Corp. v. TAG Investments

No. 20010228

Maring, Justice.

[¶1] TAG Investments and James Grettum ("TAG") appealed from a post-judgment order awarding Matrix Properties Corporation, formerly known as E.W. Wylie Corporation, ("Matrix") $4,127.60 in costs, $48,642 in attorney fees, and $135,867.19 in damages for delay in conveying real property. We affirm the award of costs and attorney fees, and we modify the time for awarding damages for delay in conveying the land and remand for recalculation of those damages.

I

[¶2] This is the fourth reported appeal emanating from an action by Matrix against TAG for specific performance of an October 14, 1996 agreement granting Matrix an option to purchase real property from TAG. In this appeal, TAG argues there is no procedural or statutory basis, including jurisdiction, for this money judgment, and the judgment is void or voidable. TAG also argues judicial estoppel bars Matrix from asserting inconsistent prejudgment and post-judgment positions, Matrix was only entitled to costs allowed by law, Matrix was not entitled to damages for loss of use of the property, and Matrix was not entitled to attorney fees. Our analysis of the issues raised by TAG requires a brief outline of the prior proceedings.

[¶3] In *Matrix Properties Corp. v. TAG Investments*, 2000 ND 88, 609 N.W.2d 737 (*Matrix I*), we affirmed a November 2, 1999 summary judgment granting Matrix specific

performance of the option agreement. We held Matrix timely and unconditionally complied with the option agreement in early July 1999. *Id.* at ¶ 1. We rejected TAG's claims that Matrix did not precisely comply with the option's notice requirement, or allow the abstract to be procured in the manner called for in the option. *Id.* at ¶¶ 9-13. We also rejected TAG's claim that Matrix failed to comply with the option by not tendering the purchase money before the option deadline expired. *Id.* at ¶ 18. We concluded the term "purchase" did not require a tender of money, and the tender of the purchase price was an incident of performance, not a condition precedent to the exercise of the option. *Id.* at ¶¶ 14-18. We also concluded that, although the option to purchase had several contingencies regarding the sufficiency of TAG's title, an objective standard governed those contingencies and Matrix had a good faith duty to raise only reasonable objections to TAG's title. *Id.* at ¶¶ 23-24. We concluded that Matrix could not rescind the option at its whim, and the option was not conditional or illusory. *Id.* at ¶ 24.

[¶4] After our decision in *Matrix I*, Matrix sought an order declaring it was not obligated to make any additional option payments to TAG in 2000 to retain rights under the option. In a June 26, 2000 order, the trial court granted Matrix's motion, concluding "pursuant to the terms of the 1996 Option Agreement, [Matrix] is not obligated to make any Option Payments to [TAG] to retain rights under the Option Agreement and that [Matrix's] valid and timely exercise of the option in July of 1999 created a binding executory contract for the purchase and sale of real property." TAG simultaneously appealed to this Court and applied for a supervisory writ, claiming the trial court exceeded its jurisdiction, the order amended a final

judgment that had been affirmed on appeal, the trial court did not have subject matter or personal jurisdiction to amend the judgment, the order was issued without due process and was in the nature of a declaratory judgment without service of a summons and complaint, and the hearing was conducted without proper notice.

[¶5] Meanwhile, on July 5, 2000, Matrix sought an order compelling TAG to provide Matrix with deeds for the property, or declaring the judicial transfer of the property to Matrix. On September 1, 2000, Matrix applied to this Court for a supervisory writ, asking us to clarify that the trial court retained jurisdiction to enforce the judgment despite TAG's pending appeal of the June 26, 2000 order. On September 25, we denied Matrix's application, indicating a trial court has continuing jurisdiction to enforce a judgment when no stay pending appeal has been granted.

[¶6] On October 24, 2000, Matrix again moved for an order compelling TAG to provide Matrix with deeds for the property, or declaring the judicial transfer of the property to Matrix. On November 8, 2000, the trial court ordered the judicial transfer of the property to Matrix on November 15. According to counsel for Matrix, counsel for TAG notified Matrix that TAG would not appear at the November 15 closing, and that TAG questioned the trial court's jurisdiction and raised a due process issue. TAG did not appear at the November 15 closing. On November 16, TAG asked this Court to vacate the November 8 order. We denied TAG's request on November 22, and on November 24, Matrix moved for an order judicially transferring the property. On December 6, 2000, TAG sought to remove the proceeding to the federal district court for North Dakota, and the federal district court remanded the case to state court on December 21.

[¶7] In the interim, on December 12, 2000, in *Matrix Properties Corp. v. TAG Investments*, 2000 ND 213, 622 N.W.2d 432 (*Matrix II*), we summarily affirmed the trial court's June 26, 2000 post-judgment order under N.D.R.App. 35.1(a)(1), and we awarded Matrix double costs under N.D.R.App. 38 and 39. On December 21, the trial court ordered TAG to appear on January 5, 2001, to convey the property. On January 5, the trial court ordered conveyance of the land to Matrix under N.D.R.Civ. 70. TAG moved to vacate the January 5 order as improperly modifying the November 2, 1999 summary judgment. On February 16, the trial court denied TAG's motion to vacate the January 5 order, and [TAG] appealed from the November 8, 2000 order, the January 5, 2001 order, and the February 16, 2001 order. On July 13, 2001, we summarily affirmed those orders under N.D.R.App. 35.1(a)(1) and (7), and we awarded Matrix double costs under N.D.R.App. 38 and 39. *Matrix Properties Corp. v. TAG Investments*, 2001 ND 128, 636 N.W.2d 674 (*Matrix III*).

[¶8] Meanwhile, in a March 26, 2001 motion, Matrix sought costs, attorney fees and damages incurred because of TAG's refusal to convey the property. The trial court continued Matrix's motion until after our decision in *Matrix III*. Matrix thereafter filed an amended motion, seeking litigation costs and attorney fees incurred after this Court's decision in *Matrix I*, and damages caused by TAG's refusal to convey the property from August 15, 1999, the date of the earliest possible closing under the option agreement, to January 5, 2001, the date the trial court ordered the transfer of the property to Matrix. The trial court awarded Matrix $4,127.60 in costs, $48,642 in attorney fees, and $135,867.19 in damages for loss of use of the property. TAG appealed.

II

[¶9] TAG argues there is no procedural or statutory basis, including jurisdiction, for this money judgment, and it is void or voidable. TAG argues Matrix's motion

> was an unprecedented post-judgment motion for damages in a specific performance action in which a final judgment had been entered almost two years earlier. Neither Matrix, nor the lower court, identified the legal basis for the unprecedented award of "costs," "damages," and "attorney fees" two years after a final judgment had been entered. The post-judgment motion procedure sanctioned by the lower court utterly denied TAG and Grettum their right to proper pleadings notifying them of the issues of the lawsuit, discovery, trial of issues of fact and a judicial decision based upon properly introduced evidence considered in light of the law. In other words, TAG and Grettum were denied due process of law.

[¶10] In an action for specific performance, a purchaser may recover damages from a seller for delay in conveying real property and the costs, if any, of recovering possession of the land. *See* N.D.C.C. § 32-03-21; *Bumann v. Maurer*, 203 N.W.2d 434, 438 (N.D. 1972); *Orfield v. Harney*, 33 N.D. 568, 579-81, 157 N.W. 124, 127 (1916); *Beddow v. Flage*, 22 N.D. 53, 60, 132 N.W. 637, 640 (1911); *Mitchell v. Knudtson Land Co.*, 19 N.D. 736, 744, 124 N.W. 946, 950 (1910). *See generally*, Annot., *Special or Consequential Damages Recoverable, On Account of Delay in Delivering Possession, by Purchaser of Real Property Awarded Specific Performance*, 11 A.L.R. 4th 891 (1982); Annot., *Specific Performance: Compensation or Damages Awarded Purchaser for Delay in Conveyance of Land*, 7 A.L.R. 2d

1204 (1949); 71 Am. Jur. 2d *Specific Performance* § 236 (2001).

[¶11] In *Cokins v. Frandsen*, 136 N.W.2d 377, 380 (N.D. 1965), however, we said a judgment on the merits is conclusive between the parties, not only as to every matter that was litigated but also as to every matter arising out of the same cause of action which might have been litigated. *See also Wolf v. Anderson*, 422 N.W.2d 400, 401-02 (N.D. 1988) (holding prior judgment that sellers were not entitled to specific performance in action for breach of contract for deed was res judicata and precluded subsequent action for damages where both actions were based on same factual situation); *Perdue v. Knudson*, 179 N.W.2d 416, 421-22 (N.D. 1970) (same). In *Cokins*, at 377-78 (Syllabus ¶¶ 1 and 3), we said a judgment decreeing specific performance of a contract and determining the rights of the parties is final, and any subsequent order to modify the final judgment is void unless made for the purpose of amending, correcting, or carrying out the judgment. In *Cokins*, 379-80, we held a post-judgment order regarding proration of taxes during a delay in conveying property was void where a prior final judgment granting specific performance of a contract for the sale of land settled all issues between the parties arising out of the contract.

[¶12] Here, in ordering the January 5, 2001 judicial transfer of the property, the trial court cited N.D.R.Civ.P. 70, which provides:

> If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other

> person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

[¶13] Rule 70, N.D.R.Civ.P., is nearly identical to corresponding F.R.Civ.P. 70, and we have often said when a state rule is adopted from a federal rule, we will consider the federal court's interpretation of its rule as persuasive authority for construing our rule. *See Mid-Dakota Clinic, P.C. v. Kolsrud*, 1999 ND 244, ¶ 6, 603 N.W.2d 475; *City of Dickinson v. Lindstrom*, 1998 ND 52, ¶ 11, 575 N.W.2d 440. *See also* N.D.R.Civ.P. 1, Explanatory Note.

[¶14] Relief under F.R.Civ.P. 70 is available only after a judgment is entered. *De Beers Consol. Mines, Ltd. v. United States*, 325 U.S. 212, 218 (1945). *See* 13 James W. Moore, *Moore's Federal Practice* ¶ 70.03 (3rd ed. 2002); 12 Wright, Miller & Marcus, *Federal Practice and Procedure: Civil 2nd*, § 3021 (1997). Both F.R.Civ.P. 70, and N.D.R.Civ.P. 70 specifically contemplate "application of the party entitled to performance." Under F.R.Civ.P. 70, parties may proceed by motion ancillary to the original action to compel the specific performance of an act required

by a judgment. *See Spain v. Mountanos*, 690 F.2d 742, 744 (9th Cir. 1982); *Gilbert v. Johnson*, 490 F.2d 827, 829 (5th Cir. 1974). *Cf., Clarke v. Chicago, B. & Q.R. Co.*, 62 F.2d 440, 441 (10th Cir. 1932) (under former equity rules). *See also Linscott v. Foy*, 1998 ME 206, ¶ 9, 716 A.2d 1017 (under M.R.Civ.P. 70); *Scott v. Majors*, 1999 UT App 139, ¶ 4-6, 980 P.2d 214 (under Utah R.Civ.P. 70).

[¶15] In *Spain*, 690 F.2d at 745, the court affirmed an additional award of attorney fees incurred in a proceeding under F.R.Civ.P. 70 to collect an initial $70,000 award of attorney fees ordered in a stipulated judgment enjoining certain prison practices. No issue was raised about the procedure for awarding additional attorney fees as part of the ancillary proceeding under F.R.Civ.P. 70. In *Linscott*, 1998 ME 206, ¶ 9, 716 A.2d 1017, no procedural issue was raised in a case where, as part of the original proceeding, the plaintiff filed a supplemental petition for attorney fees and a setoff of the purchase price after obtaining an order transferring property under M.R.Civ.P. 70. The Maine Supreme Judicial Court affirmed the award of attorney fees and costs as a sanction for "egregious" actions by the defaulting party. *Linscott*, at ¶¶ 16-19. Those authorities suggest an ancillary motion is an appropriate procedure for a court to consider issues dealing with a party's failure to comply with a judgment requiring specific performance for a conveyance of property.

[¶16] In *Westlake North Prop. Owners v. Thousand Oaks*, 915 F.2d 1301, 1303 (9th Cir. 1990), the Ninth Circuit Court of Appeals cited *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395-97 (1990), for the principle that imposition of a sanction under F.R.Civ.P. 11 is a collateral issue which may be made after the main action has been terminated. Although in *Westlake*, at 1303-04, the Ninth Circuit

ultimately concluded the trial court erred in sanctioning non-party attorneys under F.R.Civ.P. 70, the court said the trial court had jurisdiction to impose sanctions against parties under F.R.Civ.P. 70 regardless of whether the trial court had jurisdiction over the main action.

[¶17] In *Cooter & Gell*, 496 U.S. at 395-96 (citations omitted), the United States Supreme Court said:

> It is well established that a federal court may consider collateral issues after an action is no longer pending. For example, district courts may award costs after an action is dismissed for want of jurisdiction. See 28 U.S.C. § 1919. This Court has indicated that motions for costs or attorney's fees are "independent proceeding[s] supplemental to the original proceeding and not a request for a modification of the original decree." Thus, even "years after the entry of a judgment on the merits" a federal court could consider an award of counsel fees. A criminal contempt charge is likewise "'a separate and independent proceeding at law'" that is not part of the original action. A court may make an adjudication of contempt and impose a contempt sanction even after the action in which the contempt arose has been terminated. Like the imposition of costs, attorney's fees, and contempt sanctions, the imposition of a Rule 11 sanction is not a judgment on the merits of an action. Rather, it requires the determination of a collateral issue: whether the attorney has abused the judicial process, and, if so, what sanction would be appropriate. Such a determination may be made after the principal suit has been terminated.

[¶18] Similarly, in *American State Bank v. Stoltz*, 345 N.W.2d 365, 367 (N.D. 1984), we recognized this state's

settled law that a supplementary proceeding in aid of execution is not a new or separate action, but is merely a proceeding in a pending action against a judgment debtor. We said a supplementary proceeding was not an action on the judgment, but was a continuation of, and auxiliary to, the original action. *Id.* In *Stoltz*, at 367, we rejected a judgment debtor's claim the trial court lost personal jurisdiction over him when the judgment was entered.

[¶19] In *Mitchell*, 19 N.D. at 744, 124 N.W. at 950 (quoting from Pomeroy on Contracts (2nd ed. § 474)) we said:

> "All the instances in which equity thus awards damages, either in place of or in addition to some other special remedy, are particular applications of the one general principle, that complete justice should be done between litigant parties whenever jurisdiction has been acquired over them to grant any relief. This doctrine is well established, and is indeed, too familiar to require the citation of authority that whenever a court of equity has once acquired jurisdiction of a cause it will retain such cause in order to do full and complete justice between the parties with respect to the subject matter. To this end, when jurisdiction has been obtained on other grounds and for the purpose of administering an equitable remedy, damages may be assessed and adjudged in lieu of or as ancillary to the equitable relief so that the plaintiff may not be put to the trouble, expense, and delay of a second suit brought in another tribunal."

Our statements in *Mitchell* about ancillary relief and the trouble, expense, and delay of a second action are equally applicable under our current rules of civil procedure, which govern the procedure in all suits of a civil nature,

whether cognizable as cases at law or in equity, and which are construed to secure the just, speedy, and inexpensive determination of every action. *See* N.D.R.Civ.P. 1. The statements in *Mitchell* are also consistent with N.D.C.C. § 27-05-06(3), which confers jurisdiction on district courts for "[a]ll the powers, according to the usages of courts of law and equity, necessary to the full and complete jurisdiction of the causes and parties and the full and complete administration of justice, and to carrying into effect their judgments, orders, and other determinations."

[¶20] Here, shortly after Matrix exercised the option to purchase the land in early July 1999, it initiated an action for specific performance of the option agreement. In November 1999, the trial court granted Matrix summary judgment for specific performance of the option agreement without any claim for, or award of, damages for delay in conveying the land. On June 7, 2000, this Court issued its mandate affirming the summary judgment for specific performance. Matrix then moved for an order compelling TAG to transfer the property and subsequently indicated it would seek costs, attorney fees, and damages for TAG's delay in conveying the property. After procedural posturing and further delay by TAG, the trial court ultimately ordered the transfer of the land to Matrix on January 5, 2001, and Matrix then moved for costs, attorney fees, and damages incurred as a result of TAG's delay in conveying the land. Under these circumstances, we conclude Matrix's ancillary motion for costs, attorney fees, and damages was an appropriate vehicle, as part of enforcement of the judgment under N.D.R.Civ.P. 70, for the trial court to consider awarding costs, attorney fees, and damages incurred by a delay in conveying the land. However, because Matrix could have but did not make a claim for

damages for delay in conveyance in the judgment that this Court affirmed in *Matrix I*, we conclude Matrix may be entitled to damages only for a delay in conveying the land after our June 7, 2000 mandate in *Matrix I*. *See Wolf*, 422 N.W.2d at 401-02; *Perdue*, 179 N.W.2d at 421-22; *Cokins*, 136 N.W.2d at 380.

[¶21] We also reject TAG's arguments that N.D.C.C. § 27-05-27 places exclusive authority to modify a judgment in the trial judge that rendered the November 1999 judgment, and that this money judgment, which was issued by a different trial judge, is void, or erroneously issued and voidable.

[¶22] Section 27-05-27, N.D.C.C., provides:

> Except as provided by subsection 2 of section 29-15-21, any motion for a new trial, settlement of a proposed case, judgment notwithstanding the verdict, or vacation or modification of an order, judgment, or other proceeding, must be presented and heard before the judge before whom the matter was heard, considered, or determined, unless for any reason the judge is unable to act.

[¶23] The language of N.D.C.C. § 27-05-27 applies to "any motion for a new trial, settlement of a proposed case, judgment notwithstanding the verdict, or vacation or modification of an order, judgment, or other proceeding." This ancillary proceeding emanated from a proceeding for the enforcement of a judgment for specific performance, and the plain language of that statute does not apply to the enforcement of a judgment. We conclude N.D.C.C. § 27-05-27 does not apply to this ancillary proceeding.

III

[¶24] TAG argues Matrix was not entitled to damages for loss of use of the property.

A

[¶25] TAG argues Matrix was not entitled to any damages, because Matrix never made an unconditional tender of performance and the earliest date it can claim a tender of part of the money due to TAG was January 5, 2001, the date the trial court ordered conveyance of the land.

[¶26] TAG misreads a statement in *Matrix II*, 2000 ND 213, ¶ 1, 622 N.W.2d 432, "requiring TAG and Grettum to convey the subject property upon tender by Matrix of the purchase price set in the 1996 option agreement." According to TAG, that language "conclusively determined that TAG's duty to convey was conditioned upon the tender of performance by Matrix." In *Matrix I*, 2000 ND 88, ¶¶ 1, 14-18, 609 N.W.2d 737, however, we clearly held that Matrix "timely and unconditionally complied with the option agreement." Our decision in *Matrix I* is the law of the case regarding Matrix's compliance with the option, *see Tom Beuchler Const. v. City of Williston*, 413 N.W.2d 336, 339 (N.D. 1987), and it is a strained interpretation of *Matrix I* for TAG to argue that Matrix has not unconditionally complied with the option agreement. To the extent TAG now claims it had no duty to convey the property until Matrix made a full and actual tender of the purchase price to TAG, we again reiterate and clarify, for TAG's benefit, that Matrix timely and unconditionally complied with the option agreement and was entitled to performance under the option agreement. To the extent TAG claims it did not delay transfer of the property because

Matrix purportedly did not make a full and complete tender or actual payment of the purchase price, we reject TAG's arguments involving that assertion. *See Matrix I*, at ¶¶ 1, 14-18.

B

[¶27] TAG argues even if Matrix is entitled to damages, the trial court erred in calculating those damages. TAG states, in calculating damages, the trial court followed Matrix's "claim that it should have interest on the liquidated purchase price of the real property from August 15, 1999, the time Matrix should have first paid TAG [under the terms of the option agreement], to January 5, 2001," the date the trial court transferred the land to Matrix. TAG argues if Matrix is entitled to damages, those damages are limited to the rental value of the land, or an accounting and delivery of the fruits of the illegitimate possession, offset by interest on the purchase price of the land due to TAG. Because of our earlier conclusion about the time frame for damages and the procedural posture of this issue, we only need consider whether Matrix was entitled to damages for TAG's delay in conveying the land after this Court's June 7, 2000 mandate in *Matrix I* to the trial court's judicial conveyance of the land to Matrix on January 5, 2001.

[¶28] Section 32-03-21, N.D.C.C., provides:

> The detriment caused by the wrongful occupation of real property in cases not embraced in sections 32-03-22, 32-03-27, 32-03-28, and 32-03-29 is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years next preceding the commencement of the

> action or proceeding to enforce the right to damages and the costs, if any, of recovering the possession.

[¶29] Under N.D.C.C. § 32-03-21, a seller who wrongfully occupies real property and wrongfully delays the conveyance of that property is liable for the value of the use of the property for the time of such occupation. *Bumann*, 203 N.W.2d at 438; *See also Orfield*, 33 N.D. at 579-81, 157 N.W. at 127; *Beddow*, 22 N.D. at 60, 132 N.W. at 640; *Mitchell*, 19 N.D. at 744, 124 N.W. at 950. In *Bumann*, at 438, we said the value of the use may be found by requiring the party at fault to make an accounting and deliver over the fruits of the illegal possession, or to pay the fair rental value of the property. We also said the delay in performance of an agreement to convey land may be the root of special as well as general damages to the buyer. *Id.* at 439. We cautioned, however, that double recovery should not be given, first as general damages, and again as an item of special damages. *Id.*

[¶30] We have recognized the object of a court of equity is to place parties who are not at fault as nearly as possible in the same position they would have been in if there had been no default by the other party. *Orfield*, 33 N.D. at 579-81, 157 N.W. at 127; *Pillsbury v. J.B. Streeter, Jr., Co.*, 15 N.D. 174, 182, 107 N.W. 40, 43 (1906). When a conveyance of property is delayed, financial adjustments in the nature of an accounting may be made to put the parties in the same position they would have been in if the contract had been performed in a timely manner. *See generally* Annot., 11 A.L.R. 4th at pp. 892-97; Annot., 7 A.L.R. 2nd at § 1.

[¶31] Here, we reject TAG's claim it was entitled to an offset for interest on the purchase price of the land during the time TAG delayed conveying the land to Matrix. This

record unequivocally demonstrates a pattern of dilatory and vexatious conduct by TAG in delaying the conveyance of the land to Matrix. Moreover, under the option agreement, Matrix was entitled to possession of the land on August 15, 1999. Although we have concluded Matrix could have but did not make a claim for damages from that date in the judgment that was affirmed in *Matrix I*, TAG agrees the trial court awarded Matrix interest on the purchase price of the land from August 15, 1999 to January 5, 2001, which was a valuation suggested by TAG when, in seeking to avoid closing on January 5, 2001, TAG claimed it should receive interest on the purchase price during the same time period. Matrix did not receive the fruits of TAG's unlawful possession, or the rental value of the land during the time when TAG delayed conveying it. TAG retained the benefits from the land during the delay in conveying it, and TAG does not dispute Matrix's claim that the property is prime development land. Under those circumstances, we conclude Matrix was entitled to the measure of damages awarded by the trial court for the delay in conveying the land from this Court's June 7, 2000 mandate in *Matrix I* to January 5, 2001, the date the trial court ordered the conveyance of the land to Matrix. Accordingly, we remand this issue to the trial court to compute Matrix's damages during that time period.

IV

[¶32] TAG argues Matrix was not entitled to costs and attorney fees.

[¶33] If there is a delay in conveying land, N.D.C.C. § 32-03-21, authorizes the award of the "costs, if any, of recovering the possession." *See Bumann*, 203 N.W.2d at 438.

Section 28-26-01(2), N.D.C.C., authorizes the award of reasonable actual and statutory costs, including reasonable attorney fees, for defending a frivolous claim. *See In re Estate of Dion*, 2001 ND 53, ¶ 45-47, 623 N.W.2d 720. In *Dion*, at ¶ 47, we affirmed a trial court's decision to award attorney fees incurred by a party in defending against frivolous post-trial motions by another party.

[¶34] In *Matrix II* and *Matrix III*, we summarily affirmed two prior appeals by TAG in part under N.D.R.App.P. 35.1(a)(1), which authorizes affirmance of appeals that are frivolous and completely without merit. This record demonstrates that TAG has engaged in a protracted and dilatory pattern of conduct after this Court's decision in *Matrix I*, repeatedly pressing spurious claims that previously had been rejected by the trial court and this Court. *See Dion*, 2001 ND 53, ¶ 47, 623 N.W.2d 720. Under the circumstances of this case, we conclude N.D.C.C. §§ 32-03-21 and 28-26-01(2), authorize an award to Matrix of litigation costs and attorney fees for recovering possession of the land.

[¶35] A trial court has considerable discretion in awarding costs and attorney fees, and its decision will not be overturned on appeal absent an abuse of discretion. *Dion*, 2001 ND 53, ¶¶ 44, 46, 623 N.W.2d 720; *Gissel v. Kenmare Township*, 512 N.W.2d 470, 477 (N.D. 1994). Here, the trial court was well aware of the dilatory nature of TAG's conduct in these proceedings. The court indicated it had reviewed the affidavits setting forth the specific costs and attorney fees and the time when they were incurred. Under the circumstances of this case, we conclude the trial court did not abuse its discretion in awarding Matrix litigation costs and attorney fees.

V

[¶36] TAG argues judicial estoppel bars Matrix from asserting inconsistent prejudgment and post-judgment positions.

[¶37] TAG did not raise this argument in its August 21, 2001 brief in response to Matrix's motion for costs, attorney fees, and damages, and TAG is precluded from raising the issue for the first time on appeal. *See Robert v. Aircraft Inv. Co. Inc.*, 1998 ND 62, ¶ 14, 575 N.W.2d 672. Moreover, TAG's argument appears to be based in part on its misplaced assertion that Matrix did not unconditionally comply with the option agreement, an assertion we specifically rejected in *Matrix I* and explicitly have reiterated for TAG's benefit in this case. Accordingly, we reject TAG's argument about judicial estoppel.

VI

[¶38] As Justice Vogel wrote for this Court in *City of Wahpeton v. Drake-Henne, Inc.*, 228 N.W.2d 324, 331 (N.D. 1975) (quoting from *Bros. Inc. v. W.E. Grace Mfg. Co.*, 320 F.2d 594, 597-98 (5th Cir. 1963)), "'"It is for the public interest and policy to make an end to litigation . . .' so that '. . . suits may not be immortal, while men are mortal."'" Those comments are especially applicable to the protracted proceedings in this case.

VII

[¶39] We affirm the trial court's award of costs and attorney fees, and we modify the time period for the award

of damages and remand for recalculation in accordance with this opinion.

[¶40] Mary Muehlen Maring
William A. Neumann
Dale V. Sandstrom
William F. Hodny, S.J.
Gerald W. VandeWalle, C.J.

[¶41] The Honorable William F. Hodny, S.J., sitting in place of Kapsner, J., disqualified.

STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF CASS — EAST CENTRAL JUDICIAL DISTRICT

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation,

Plaintiffs,

vs.

TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota,

Defendants.

Civil No. CV-99-02045

ORDER

The above-captioned matter came on for hearing before the Court on the 27th day of August, 2001, on Plaintiff's Amended Motion for Damages. Sidney J. Spaeth of Vogel, Weir, Hunke & McCormick, Ltd., appeared on behalf of plaintiff. Jonathan T. Garaas of Garaas Law Firm, appeared on behalf of defendants.

The Court, having reviewed the memoranda of law, heard the arguments of counsel, and being fully advised in the premises;

It is hereby **ORDERED** that:

1. Defendants, and each of them jointly and severally, shall pay to Plaintiff damages for costs in the amount of $4,127.60; and

2. Defendants, and each of them jointly and severally, shall pay to Plaintiff damages for attorneys' fees in the amount of $48,642; and

3. Defendants, and each of them jointly and severally, shall pay to Plaintiff damages for loss of use of the property from August 15, 1999 to January 5, 2001, in the amount of $135,867.19.

THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY FORTHWITH.

Dated this 27th day of August, 2001.

BY THE COURT:

/s/ Georgia Dawson
Judge of District Court

STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF CASS — EAST CENTRAL JUDICIAL DISTRICT

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation,

Plaintiffs,

vs.

TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota,

Defendants.

Civil No. CV-99-02045

JUDGMENT

The Court having entered its order for judgment with respect to plaintiff's amended motion for damages,

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that plaintiff shall have and recover from the defendants, jointly and severally, the sum of $188,636.79.

Witnesseth the Honorable Georgia Dawson, Judge of the District Court for the County of Cass this 11th day of September, 2001.

/s/ Dorothy Howard
Clerk of the District Court

By /s/ Della M. Hagen,
Deputy

Filed 6/6/02 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2002 ND 99

Matrix Properties Corporation, Plaintiff and Appellee

v.

JCG Investments, L.L.C.; Anderson and Grettum Investments; R. Allan Rostad; Thomas Richards; and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint, Defendants

Carol A. Grettum, TAG Investments, and Jonathan T. Garaas, Appellants

No. 20020011

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Cynthia Rothe-Seeger, Judge.

AFFIRMED.

Per Curiam.

Sidney J. Spaeth, Vogel, Weir, Hunke & McCormick, Ltd., P.O. Box 1389, Fargo, N.D. 58107-1389, for plaintiff and appellee.

Jonathan T. Garaas, Garaas Law Firm, DeMores Office Park, 1314 23rd Street South, Fargo, N.D. 58103-3796, for appellants.

Matrix Properties Corp. v. JCG Investments, L.L.C.
No. 20020011

Per Curiam.

[¶ 1] TAG Investments, Carol Grettum, and Jonathan T. Garaas appeal from a judgment quieting title to certain real property and ordering TAG and Garaas to pay costs and attorneys fees, and from an order denying a motion to alter, amend, or vacate the judgment. We affirm under N.D.R.App.P. 35.1(a)(1). We specifically note that under the facts of this case TAG and Grettum have no vendor's lien on the subject real property.

[¶ 2] We conclude that the appeal is frivolous. We, therefore, order under N.D.R.App.P. 38 and 39 that Matrix is entitled to double costs in the amount of $150 and is entitled to attorney fees in the amount of $5,000, for a total of $5,150 for this appeal.

[¶ 3] Gerald W. VandeWalle, C.J.
Mary Muehlen Maring
William A. Neumann
Dale V. Sandstrom
Donald L. Jorgensen, D.J.

[¶ 4] The Honorable Donald L. Jorgensen, D.J., sitting in place of Kapsner, J., disqualified.

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA.

Matrix Properties Corporation,	
Plaintiff,	**MEMORANDUM OPINION AND ORDER GRANTING SUMMARY JUDGMENT**
vs.	
JCG Investments, L.L.C; Anderson and Grettum Investments; R. Allan Rostad; Thomas Richards; and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint,	**Civil No. 09-01-C-1052**
Defendants.	

The above matter was brought before the Court on Plaintiff's Motion for Summary Judgment to Quiet Title. Defendant TAG Investments filed a brief in opposition to the motion through its attorney Jonathan Garaas. Defendant Carol Grettum filed a brief in opposition to the motion through her attorney J. Philip Johnson. This case is the result of decisions made in Civil File No. 99-02045, and the Court takes judicial notice of that file. A hearing was held on November 1, 2001.

STATEMENT OF THE CASE

In October 1996, TAG Investments agreed to sell E.W. Wylie, n/k/a Matrix Properties, certain real estate in Cass County. *Matrix Properties Corp. v. TAG Invs.*, 2000 ND 88,

¶ 2, 609 N.W.2d 737. As part of the transaction, TAG gave Matrix an option to purchase an additional 114 acres. *Id.* In July 1999, TAG informed Matrix that it would not honor the option agreement. *Id.* at ¶ 7. Matrix filed suit against TAG and James Grettum[1] arguing that it had complied with the option agreement. *Id.* On October 27, 1999, this Court found that Matrix had complied with the option agreement and ordered specific performance. On November 2, 1999, Judgment was entered.

On December 21, 1999, Matrix filed a lis pendens on the 114 acres that was subject to the option agreement. *See Order*, CV-99-02045, doc. #185 (Jan. 5, 2001). On January 26, 2000, James Grettum deeded Carol Grettum an interest in Tract 2B, which is a part of the 114 acres. *See Pl.'s Ex. #2*, CV-99-02045, doc. #183 (Jan. 5, 2001). On April 27, 2000, the North Dakota Supreme Court affirmed this Court in holding that the option had been exercised, and it ordered specific performance of the option agreement. *Matrix*, 2000 ND 88, ¶ 1, 609 N.W.2d 737.

However, this ruling did not resolve the matter. On November 8, 2000, this Court issued an Order directing Defendants to issue all the appropriate deeds and documents to the parcels that comprised the 114 acres. *See Order*, CV-99-02045, doc. #123 (Nov. 8, 2000). Once all the appropriate deeds and documents were executed and delivered to Matrix, the Order directed Matrix to pay Defendants $876,972.35. *Id.* On December 12, 2000, the North Dakota Supreme Court affirmed this Order, and

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[1] James Grettum is a general partner in TAG Investments. *Matrix*, 2000 ND 88, ¶ 5, 609 N.W.2d 737.

awarded double costs to Matrix. *Matrix Properties Corp. v. TAG Invs.*, 2000 ND 213, ¶ 1, 622 N.W.2d 432. The supreme court also directed the district court to order specific performance requiring TAG and James Grettum to convey the 114 acres once Matrix paid for the land. *Id.*

Again this did not resolve the matter. On January 5, 2001, the Court held another hearing to perform the closing, but Attorney Garaas refused to accept the checks that Matrix issued. *See Hr'g Tr. at 60*, CV-99-02045 (Jan. 5, 2001). Therefore Matrix mailed the checks to the Garaas Law Firm. *See Certificate of Service*, CV-99-02045, doc. #187 (Jan. 5, 2001). Attorney Garaas acknowledged receipt of these checks. *See Mot. in Supp. of Aff. of James A. Grettum*, CV-99-02045, doc. #191 (Jan. 16, 2001).

Also on January 5, the Court issued an order that stated that Matrix had paid for the 114 acres, that all interests in that real estate were divested from any party claiming an interest, and that all interests in the real estate were now vested in Matrix. *See Order*, CV-99-02045, doc. #185 (Jan. 5, 2001). The North Dakota Supreme Court affirmed this Order and awarded double costs to Matrix under N.D.R.App.P. 38 and 39. *Matrix Properties Corp. v. TAG Invs.*, 2001 ND 128, ¶ 1.

Yet again this did not resolve the matter. On April 9, 2001, Matrix had to file a complaint to quiet title because Defendants still have not transferred the real estate to Matrix. Matrix's motion for summary judgment is to have quiet title granted. Matrix's motion for Rule 11 sanctions is based on the fact that Defendants filed, without any basis, an answer to the complaint, and Defendants continue to litigate this case even though it has already been decided.

ANALYSIS

I. Summary Judgment

Summary judgment is a method for promptly and expeditiously disposing of a controversy, without trial, if either party is entitled to judgment as a matter of law. *Mead v. Farmers Union Mut. Ins. Co.*, 2000 ND 139, ¶ 12, 613 N.W.2d 512. "Res judicata means that a valid, existing final judgment from a court of competent jurisdiction is conclusive, with regard to the issues raised . . . as to the parties and their privies in all other actions." *Id.* at ¶ 15 (quoting *Ohio Cas. Ins. Co. v. Clark*, 1998 ND 153, ¶ 23, 583 N.W.2d 377).

In this Case, the only two parties claiming an interest in the real estate are TAG and Carol Grettum. This issue has already been litigated, and this Court divested both parties of their interests in the January 5, 2001 Order. The North Dakota Supreme Court affirmed that order. *Matrix*, 2001 ND 128, ¶ 1. Therefore, this issue is res judicata, and summary judgment is appropriate. *Mead*, 2000 ND 139, ¶ 15, ¶ 12, 613 N.W.2d 512.

The Court has considered the remainder of the arguments made by Attorney Garaas and deems them to be without merit. The arguments that Attorney Johnson makes have previously been considered by the Court. *See Order*, CV-99-02045, doc. #185 (Jan. 5, 2001). Carol Grettum took her interest in the property subject to the lis pendens. Under North Dakota Century Code section 28-05-07, she is bound by all proceedings subsequent to December 21, 1999. This issue is also res judicata, and summary judgment is appropriate. *Mead*, 2000 ND 139, ¶ 15.

On January 5, 2001, Matrix mailed three checks to Attorney Garaas' office, and one of the checks was in the amount of $254,830.58. *Certificate of Service*, CV-99-02045, doc. #187 (Jan. 5, 2001). The check was written out to TAG Investments, James A. Garaas, and Carol A. Grettum. *Id.* Attorney Garaas acknowledged receipt of the check. *See Mot. in Supp. of Aff. of James A. Grettum*, CV-99-02045, doc. #191 (Jan. 16, 2001). Carol Grettum has been paid.

II. Rule 11 Sanctions

A court may award appropriate sanctions against an attorney who violates Rule 11(b) of the North Dakota Rules of Civil Procedure. N.D.R.Civ.P. 11(c). Rule 11(b) states that when an attorney signs a pleading or written motion, he or she is certifying that to be the best of that person's knowledge, the defenses are warranted by existing law or the defenses are warranted by a nonfrivolous extension of existing law. Rule 11 requires a court to impose appropriate sanctions upon the person signing a pleading or motion if that party violates the requirements of the rule. *Williams v. State*, 405 N.W.2d 615, 624 (N.D. 1987).

A person's actions must be objectively reasonable in order to avoid Rule 11 sanctions. *Wesley v. Don Stein Buick, Inc.*, 184 F.R.D. 376, 378 (D.Kan. 1998). As detailed above, the history of this case reveals that the Court has had to intervene numerous times in order to compel parties, represented by Attorney Garaas, to deliver the appropriate deeds and documents to the property. The North Dakota Supreme Court has repeatedly affirmed these orders for specific performance. The present quiet

title action would not have been necessary if Defendants would have conveyed the property as ordered.

In this quiet title action, Attorney Garaas filed and signed an answer on behalf of TAG Investments and Carol Grettum. In the answer, he continued to argue that the option agreement was not valid despite the North Dakota Supreme Court's April 27, 2000 decision. Further, Attorney Garaas filed and signed a motion opposing summary judgment. The arguments are completely without merit. Attorney Garaas' actions in this case are not objectively reasonable. *See Wesley*, 184 F.R.D. at 378 (stating the standard for Rule 11 sanctions). Rule 11 sanctions are required in this case. *See Williams*, 405 N.W.2d at 624 (stating that any person who signs a pleading or motion in violation of Rule 11 must be sanctioned).

DECISION

IT IS ORDERED:

1. Defendants, known and unknown (collectively "Defendants"), having been properly served with this action, are decreed to have no claim, estate interest in, or lien or encumbrance upon the Property at issue, the legal description of which is as follows (the "Property"):

TRACT A:

The East Half of the Southwest Quarter of Section Twenty-two, in Township One Hundred Thirty-nine North of Range Forty-nine West of the Fifth Principal Meridian, Cass County, North Dakota.

TRACT B:

A tract of land located in the Southeast Quarter (SE¼) of Section Twenty-two (22), Township One Hundred Thirty-nine (139) North of Range Forty-nine (49) West of The Fifth Principal Meridian, described as follows:

Beginning at the Northwest Corner of the SE¼; thence N88 04'13"E along the North line of the SE¼ for a distance of 1758.84 feet; thence 502 14'13"E 137.39 feet; thence southwesterly along a circular curve, concave to the northwest, radius of 750.00 feet and an arc length of 613.59 feet; thence S44 38'18"W 342.67 feet; thence along a circular curve, concave to the northwest, radius of 1000.00 feet and an arc length of 764.53 feet; thence S88 26'34"W 572.66 feet to a point on the West line of the SE¼; thence N02 23'48"W, along the West line of the SE¼, 1191.78 feet to the Northwest corner of the Southeast Quarter and the point of beginning.

[Less the West One Hundred and Twenty feet (W. 120') thereof]

2. That title to the Property be quieted in the name of Plaintiff Matrix Properties Corporation as to any claims of Defendants, and Defendants are forever barred and enjoined from further asserting same.

3. Defendant TAG Investments and its counsel, Jonathan Garaas, and both of them jointly and severally, shall pay to Plaintiff damages for costs in the amount of $133.59.

4. Defendant TAG Investments and its counsel, Jonathan Garaas, and both of them jointly and severally,

shall pay to Plaintiff damages for costs in the amount of $7,211.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this 7th day of November, 2001.

BY THE COURT:

/s/ Cynthia Rothe-Seeger
Cynthia Rothe-Seeger
District Judge
East Central Judicial District

IN DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA

Matrix Properties Corporation, Plaintiff, vs. JCG Investments, L.L.C; Anderson and Grettum Investments; R. Allan Rostad; Thomas Richards; and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint, Defendants.	File No. 09-01-C-1052 **JUDGMENT**

In accordance with the Court's Memorandum Opinion and Order Granting Summary Judgment dated November 7, 2001, it is

ORDERED, ADJUDGED, AND DECREED that:

1. Defendants, known and unknown (collectively "Defendants"), having been properly served with this action, are decreed to have no claim, estate interest in, or lien or encumbrance upon the Property at issue, the legal description of which is as follows (the "Property"):

TRACT A:

The East Half of the Southwest Quarter of Section Twenty-two, in Township One Hundred Thirty-nine North of Range Forty-nine West of the Fifth Principal Meridian, Cass County, North Dakota.

TRACT B:

A tract of land located in the Southeast Quarter (SE¼) of Section Twenty-two (22), Township One Hundred Thirty-nine (139) North of Range Forty-nine (49) West of The Fifth Principal Meridian, described as follows:

Beginning at the Northwest Corner of the SE¼; thence N88° 04'18"E along the North line of the SE¼ for a distance of 1758.84 feet; thence 502° 14'13"E 137.39 feet; thence southwesterly along a circular curve, concave to the northwest, radius of 750.00 feet and an arc length of 613.59 feet; thence S44° 38'18"W 342.67 feet; thence along a circular curve, concave to the northwest, radius of 1000.00 feet and an arc length of 764.53 feet; thence S88° 26'34"W 572.66 feet to a point on the West line of the SE¼; thence N02° 23'48"W, along the West line of the SE¼, 1191.78 feet to the Northwest corner of the Southeast Quarter and the point of beginning.

[Less the West One Hundred and Twenty feet (W. 120') thereof]

2. That title to the Property be quieted in the name of Plaintiff Matrix Properties Corporation as to any claims of Defendants, and Defendants are forever barred and enjoined from further asserting same.

3. Defendant TAG Investments and its counsel, Jonathan Garaas, and both of them jointly and severally, shall pay to Plaintiff damages for costs in the amount of $133.59.

4. Defendant TAG Investments and its counsel, Jonathan Garaas, and both of them jointly and severally,

shall pay to Plaintiff damages for costs in the amount of $7,211.00.

making a total judgment of $7,344.59. (lmb)

WITNESS, The Honorable Cynthia Rothe-Seeger, and my hand and seal this 14th day of November, 2001.

/s/ Dorothy Howard
Dorothy Howard
Clerk of Cass County District Court
By: Linda Brook Deputy

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA.

Matrix Properties Corporation,	)	
Plaintiff,	)	**ORDER DENYING MOTION TO ALTER, AMEND, OR VACATE THE JUDGMENT**
vs.	)	
JCG Investments, L.L.C; Anderson and Grettum Investments; R. Allan Rostad; Thomas Richards; and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint,	)	**Civil No. 09-01-C-1052**
Defendants.	)	

The above matter was brought before the Court on Defendants TAG Investments and Carol Grettum's Motion to Alter, Amend or Vacate the Judgment in this quiet title action. A hearing was held on December 21, 2001.

Under Rule 52(b) of the North Dakota Rules of Civil Procedure, a court may amend its findings and may amend the judgment. Under Rule 60(b), a court may relieve a party of a final judgment if any of the six enumerated reasons apply.

After reviewing the file and judgment in this case, the Court finds that there are no significant errors that require the judgment to be amended. Additionally, the Court does not find that any of the six enumerated reasons

under Rule 60(b) apply in this case. Therefore, the judgment will not be vacated.

DECISION

IT IS ORDERED:

The motion to alter, amend, or vacate the judgment is **DENIED**.

Dated this 3rd day of January, 2002.

BY THE COURT:

/s/ Cynthia Rothe-Seeger
Cynthia Rothe-Seeger
District Judge
East Central Judicial District

Filed 7/16/02 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2002 ND 119

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation, Plaintiff and Appellee

v.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota, Defendants and Appellants

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No. 20020026

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Georgia Dawson, Judge.

AFFIRMED.

Per Curiam.

Sidney J. Spaeth, Vogel, Weir, Hunke & McCormick, Ltd., P.O. Box 1389, Fargo, N.D. 58107-1389, for plaintiff and appellee.

Jonathan T. Garaas, Garaas Law Firm, DeMores Office Park, 1314 23rd Street South, Fargo, ND 58103-3796, for defendants and appellants.

Matrix v. TAG Investments

No. 20020026

Per Curiam.

[¶ 1] TAG Investments and James A. Grettum appealed from an order and judgment offsetting against the amount Matrix Properties Corporation was ordered to pay TAG and Grettum for real property under a 1996 option agreement, the amount awarded to Matrix from TAG and Grettum for costs, attorney fees and damages for delay and loss of use of the property, resulting in Matrix owing TAG and Grettum a balance of $66,193.79. The major arguments raised by TAG and Grettum have been rejected by this Court in previous decisions in this protracted litigation. *See Matrix Properties Corp. v. TAG Investments*, 2000 ND 88, 609 N.W.2d 737; *Matrix Properties Corp. v. TAG Investments*, 2000 ND 213, 622 N.W.2d 432; *Matrix Properties Corp. v. TAG Investments*, 2001 ND 128, 636 N.W.2d 674; *Matrix Properties Corp. v. TAG Investments*, 2002 ND 86, 644 N.W.2d 601; *Matrix Properties Corp. v. JCG Investments, L.L.C.*, 2002 ND 99. We affirm under N.D.R.App.P. 35.1(a)(7), subject to the adjustment of damages ordered in *Matrix Properties Corp.*, 2002 ND 86, ¶ 39, 644 N.W.2d 601, and a $75 reduction in the cost judgment.

[¶ 2] Gerald W. VandeWalle, C.J.
Dale V. Sandstrom
William. A. Neumann
Mary Muehlen Maring
William F. Hodny, S.J.

[¶ 3] The Honorable William F. Hodny, Surrogate Judge, sitting in place of Kapsner, J., disqualified.

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF CASS EAST CENTRAL DISTRICT

Matrix Properties Corporation, a Minnesota corporation, formerly known as E. W. Wylie Corporation, Plaintiff, vs. TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota, Defendants.	Civil No. CV-99-02045 **ORDER**

Plaintiff's Motion to Offset Judgments and the Motion of Carol Grettum to Intervene/To Direct Payment of Proceeds From Sale of Real Estate came on before this Court for consideration on November 21, 2001, at 1:30 p.m. in the Cass County Courthouse, Fargo, North Dakota. Appearances were as noted on the record. Based on the files and pleadings herein, IT IS THE ORDER OF THIS COURT as follows:

1. Plaintiff's Motion to Offset Judgments is granted. Plaintiff is permitted to offset its indebtedness respecting Tract 2b, as determined by this Court's November 20, 1999 Judgment and January 5, 2001 Order, against the Defendants' monetary obligation to the Plaintiff as determined by this Court in its September 11, 2001 Judgment. The balance of $66,193.79 due and owing by the Plaintiff to the Defendants for Tract

2b, shall in accord with this Court's January 5, 2001 Order, be paid to the Defendant TAG Investments.

2. The Motion of Carol Grettum to Intervene And to Direct Payment of Proceeds from Sale of Real Estate is denied on grounds that the same is untimely and lacks a factual or legal basis.

Dated this 27th day of November, 2001.

/s/ Georgia Dawson
Honorable Georgia Dawson
District Court Judge

[Handwritten]

Dean Clerk
J should be entered as submitted
12/6/2001 ep

(Filed Dec. 6, 2001)

STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF CASS — EAST CENTRAL JUDICIAL DISTRICT

Matrix Properties Corporation, a Minnesota corporation,

Plaintiffs,

vs.

TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota,

Defendants.

Civil No. CV-99-02045

JUDGMENT

Pursuant to the following Judgments and Orders wherein Plaintiff was awarded relief against the Defendants:

1) A Judgment of the North Dakota Supreme Court dated April 27, 2000, (attached hereto as Exhibit A); and

2) A Judgment of the North Dakota Supreme Court dated December 12, 2000, awarding double costs and disbursements (attached hereto as Exhibit B); and

2) An Order of Dismissal of the North Dakota Supreme Court dated February 7, 2001, dismissing the appeal of defendants (attached hereto as Exhibit C); and

3) An Order of the District Court dated January 5, 2001, transferring the Property (attached hereto as Exhibit D); and

4) A Judgment of the North Dakota Supreme Court dated July 13, 2001, awarding double costs and disbursements (attached hereto as Exhibit E);

THEREFORE, it is ordered, adjudged and decreed that pursuant to the Orders and Judgments set forth above and in Exhibits A, B, C and E, Plaintiff shall have and recover from the Defendants, jointly and severally, the sum of $450; and

Pursuant to the Court's Order of January 5, 2001, it is further ordered, adjudged and decreed that:

GENERAL

1. Three Parcels of real property are subject to this action, which parcels are referenced in this Order and more particularly described on Attached Exhibit A as Tract 1, Tract 2a and Tract 2b (sometimes, collectively, referred to herein as the "Tracts").

2. This Court and the North Dakota Supreme Court have previously ordered TAG and James A. Grettum to specifically perform under the Option to Purchase dated October 14, 1996 (the "Option to Purchase") among Matrix, TAG, James A. Grettum, Wells Fargo Bank North Dakota, N.A., f/k/a Norwest Bank North Dakota, N.A., as Trustee of the Clapp Land Trust Agreement created by Margaret C. Schuster, Edwin G. Clapp, Jr., and Dorothy C. King, on October 14, 1976 (sometimes referred to herein as the "Clapp Land Trust") and others.

3. TAG and James A. Grettum have repeatedly refused to so specifically perform to convey the Tracts to Matrix. Accordingly, this Court, in part pursuant to

N.D.R.C.P. 70, must divest any and all right, title and interest of certain parties to the Tracts, and vest in Matrix any and all such right, title and interest, as more fully set forth herein.

TRACT 1

4. Pursuant to Sections 2, 13 and 17 of the Option to Purchase, the sum of $332,900.00 is owed by Matrix to TAG for Tract 1.[1]

5. Fee title to Tract 1 is currently held in the name of the Clapp Land Trust, and is subject to the unrecorded Land Option and Selected Land Agreement dated August 23, 1993, as amended by two amendments dated April 1, 1996 and October 14, 1996 (as amended, the "Underlying Option"), between the Clapp Land Trust, as optionor, and TAG Investments, as successor optionee. Copies of the Underlying Option are attached hereto as Exhibit B.

6. Pursuant to Section 11 of the Underlying Option, the amount to which the Clapp Land Trust is entitled for relinquishing its fee interest in Tract 1 is $202,872.00. Matrix has paid the sum of $202,872.00 to the Clapp Land Trust, and is entitled to a credit for such sum against sums otherwise owing to TAG for Tract 1 under the Option to Purchase. Accordingly, Matrix has paid to TAG the sum of $130,028.00.[2]

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[1] (35.52 acres @ $9,375.00/acre) minus $100.00 (abstract reimbursement) minus 0 (2000 taxes fully paid) equals $332,900.00

[2] $332,900.00 minus $202,872.00 equals $130,028.00.

7. Based upon such payments by Matrix to TAG and the Clapp Land Trust:

a. Any and all rights, title and interests of TAG Investments and James A. Grettum, or anyone claiming by, through or from either of them, in and to tract 1 are divested in whole, and any and all such rights, title and interests are conveyed, transferred, vested and adjudged to be in Matrix Properties Corporation, a Minnesota corporation.

b. Any and all rights, title and interests of TAG Investments and James A. Grettum, or anyone claiming by, through or from either of them, in and to the Underlying Option as pertains to Tract 1 is divested, and any and all such rights, title and interests as conveyed, transferred, vested and adjudged to be in Matrix Properties Corporation, a Minnesota corporation.

8. The Clapp Land Trust shall convey Tract 1 to Matrix by Warranty Deed according to the terms and provisions of the Underlying Option in the form attached hereto as Exhibit C.

TRACT 2a

9. Pursuant to Sections 2, 13 and 17 of the Option to Purchase, the sum of $291,509.97[3] is owed by Matrix to TAG for Tract 2a. Matrix has paid such sum to TAG.

[3] (31.15 acres @ $9,375.00/acre) minus $100.00 (abstract reimbursement) minus $421.28 (unpaid 2000 taxes) equals $291,509.97.

10. Based upon such payment, any and all rights, title and interests of TAG Investments and James A. Grettum, or anyone claiming by, through or from either of them, in and to Tract 2a is divested in whole, and any and all such rights, title and interests are conveyed, transferred, vested and adjudged to be in Matrix Properties Corporation, a Minnesota corporation.

TRACT 2b

11. Pursuant to Sections 2, 13 and 17 of the Option to Purchase, the sum of $254,830.58[4] is owed by Matrix to TAG for Tract 2b. Matrix has paid such sum to TAG, James A. Grettum and Carol A. Grettum, jointly.

12. Based upon such payment, any and all rights, title and interests of TAG Investments, James A. Grettum or Carol A. Grettum, or anyone claiming by, through or from any of them, in and to Tract 2b is divested in whole, and any and all such rights, title and interests are conveyed, transferred, vested and adjudged to be in Matrix Properties Corporation, a Minnesota corporation.

LIS PENDENS

13. The rights, title and interests of TAG Investments, James A. Grettum and Carol A. Grettum, and anyone claiming by, through or from any of them, are

[4] (27.22 acres @ $9,375.00/acre minus $356.92 (2000 unpaid taxes) equals $254,830.58.

adjudicated as provided in paragraphs 7, 10 and 12 above for, among others, the following reasons:

a. Plaintiff recorded its Notice of Lis Pendens in this action, against the real property subject to this action, in the office of the Cass County, North Dakota Register of Deeds on December 21, 1999, at 1:00 p.m., as Doc. No. 948127;

b. Carol A. Grettum received a quit claim deed from defendant James a. Grettum, covering Tract 2b, which deed was dated January 26, 2000, and was recorded in the office of the Cass County, North Dakota Register of Deeds on May 4, 2000 as Doc. No. 956204; and

c. Pursuant to N.D.C.C. § 28-05-07, Carol A. Grettum and anyone claiming by, through or from TAG Investments, James A. Grettum or Carol Grettum whose conveyance or encumbrance is executed or recorded after the time of filing of said Notice of Lis Pendens is deemed a subsequent purchaser or encumbrancer with notice and is bound by these proceedings to the same extent as if they were a party to this action.

WITNESS, The Honorable Georgia Dawson, and my hand and seal this 6th day of December, 2001.

/s/ Dorothy Howard
Dorothy Howard
Clerk of Cass County District Court

Filed 4/27/00 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2000 ND 88

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation, Plaintiff and Appellee

v.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota, Defendants and Appellants

---

No. 990336

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Ralph R. Erickson, Judge.

AFFIRMED.

Opinion of the Court by VandeWalle, Chief Justice.

Sidney J. Spaeth, Vogel, Weir, Bye, Hunke & McCormick, Ltd., 502 First Avenue North, P.O. Box 1389, Fargo, ND 58107-1389, for plaintiff and appellee.

Jonathan T. Garaas, Garaas Law Firm, 1314 23rd Street South, Fargo, ND 58103, for defendants and appellants.

Matrix Properties Corp. v. TAG Investments

No. 990336

VandeWalle, Chief Justice.

[¶1] TAG Investments and James A. Grettum ("TAG") appealed from a summary judgment in favor of E.W. Wylie Corporation ("Wylie"), granting specific performance of an option agreement. TAG asserts Wylie failed to exercise its option, and alternatively, its exercise of the option was conditional. Wylie timely and unconditionally complied with the option agreement. We affirm.

[¶2] In October 1996, TAG agreed to sell Wylie certain real estate in Cass County. As part of the transaction, Wylie received an option to purchase approximately 114 additional acres from TAG. The real estate consisted of two tracts of land: Tract I was 35.52 acres and Tract II was 78.37 acres of land. The option to purchase required Wylie pay $9,375.00 per acre for the real estate and could be exercised any time before June 1, 2001 at 5 P.M.

[¶3] However, by its terms, exercise of the option required Wylie to make minimum purchases of the option land prior to June 1, 2001. Wylie was required to purchase at least 20 acres of land on or before June 1, 1999 and at least 40 acres on or before June 1, 2000.

[¶4] Within 10 days of Wylie exercising its option for an "Individual Parcel," TAG was required to deliver to Wylie an abstract of title for the parcel. If the abstract of title

failed to disclose a "good and marketable" title, Wylie could declare the option and the exercise or partial exercise thereof null and void. If no objections were made by Wylie to the title, closing was to occur within 45 days of the notice. However, if Wylie objected to title, TAG could be granted up to 120 days to cure the title problems.

[¶5] On May 26, 1999, Wylie gave notice to James Grettum, a general partner of TAG, that it was going to purchase 21.82 acres of land pursuant to the option agreement. The letter, dated May 25, 1999, stated:

> This letter shall serve as our written intention to purchase 21.82 acres in the South portion of Tract II.
>
> Enclosed you will find a Certificate of Survey prepared by Ulteig Engineers describing the acres to be purchased. At your earliest convenience would you please supply us with an updated abstract.
>
> The legal description for the Abstract of Title should match the legal description on the enclosed Certificate of Survey.
>
> Please notify me when the abstract has been prepared so we may proceed with a title opinion. If you would prefer to have us order the abstract please notify me upon receipt of this letter.

[¶6] An abstract of title was obtained by Wylie on June 14, 1999. The abstract revealed an ambiguity in recorded documents and Wylie determined TAG must secure certain quit claim deeds to remove any ambiguities of title. On June 21, 1999, TAG transferred the 21.82 acre plot to Grettum. With closing scheduled for June 28, 1999, Grettum delivered a letter to Wylie on June 25, 1999, stating

he had received the relevant real estate and TAG determined it was free of any obligations under the option to purchase because Wylie had not timely purchased 20 acres on or before June 1, 1999. Grettum was willing to sell the 21.82 acres with the following conditions:

- The purchase price for the sale of the 21.82 acres will be $187,500, less any amounts the City of Fargo may pay me for a road right of way;
- E.W. Wylie Corporation must acknowledge, in writing and in a recordable format, that the Option to Purchase dated October 14, 1996, is no longer in force or effect, and that it has been terminated by its own provisions because of the failure of E.W. Wylie Corporation to make the minimum purchase of 20 acres by June 1, 1999;
- The closing be structured in such a manner that I can take advantage of a Section 1031 like-kind tax free exchange;
- The closing take place on or before July 12, 1999, and I will not be required to do any corrective title work. E.W. Wylie Corporation must accept the property subject to all matters of record on June 2, 1999.

After receiving the letter, Wylie pressed to close on June 28, 1999, but refused to acknowledge the option to purchase had terminated. TAG relented and did not require Wylie to "acknowledge . . . the Option to Purchase dated October 14, 1996, is no longer in force or effect, and that it has been terminated by its own provisions because of the failure of E.W. Wylie Corporation to make the minimum purchase of 20 acres by June 1, 1999." The parties closed

on the 21.82 acre sale, with both parties having contradictory views on the effect of the sale.

[¶7] In early July, Wylie sent letters to TAG and Grettum, notifying them of its intent to exercise its option and purchase the remaining option property. TAG responded that it considered itself free of any further obligations under the option agreement, because Wylie had not tendered the purchase money prior to June 1, 1999. Wylie instituted this lawsuit against TAG and Grettum for specific performance of the option to purchase, alleging breach of contract, estoppel, waiver and fraud. Wylie moved for summary judgment, arguing Wylie had complied with the terms of the Option Agreement and was entitled to specific performance of the option. The district court agreed, granting summary judgment in favor of Wylie.

[¶8] Summary judgment is a procedural device for the prompt and expeditious disposition of a controversy without trial if either party is entitled to judgment as a matter of law, if no dispute exists as to either the material facts or the inferences to be drawn from undisputed facts, or if resolving disputed facts would not alter the result. *Twichell v. Treitline*, 1998 ND 10, ¶ 6, 574 N.W.2d 194. On appeal, we review the evidence in the light most favorable to the party opposing the motion for summary judgment. *Id.*

I

A

[¶9] TAG argues Wylie failed to properly exercise the option agreement, pointing out Wylie's exercise was not in precise compliance with the option agreement. TAG, citing *Fries v. Fries*, 470 N.W.2d 232 (N.D. 1991), contends Wylie

did not precisely comply with the option's notice requirement or allow the abstract to be procured in the manner called for in the option.

[¶10] The exercise of an option, just like acceptance of an offer, must be unconditional. *Mason v. Haakenson*, 303 N.W.2d 557, 558 (N.D. 1981). An optionee must exercise the option within the time and upon the terms and conditions provided in the agreement. *Id.* An attempt to exercise an option that deviates from the terms of the option acts as a rejection of the option and counteroffer. *Id.*

[¶11] In *Fries*, this Court held the exercise of an option failed because it deviated from the terms of the option agreement. After Jake and Mary Fries divorced, Jake received 240 acres of their farmland and Mary received 160 acres of farmland. Jake was also given an option to purchase all of Mary's 160 acres. After being diagnosed with cancer, Jake assigned to his seven children his option to purchase Mary's 160 acres. The children attempted to partially exercise the option by purchasing a six-sevenths interest of the property. A majority of this Court held exercise of the option failed because the agreement required full purchase of the entire quarter section. Since the children attempted to purchase only a six-sevenths interest in the quarter section, it was not in "exact compliance" with the option. *Id.* at 234.

[¶12] TAG asserts the option required a certified mailing to TAG, but the mailing went to James Grettum. Thus, Wylie did not precisely comply with the option agreement. This argument is without merit. It is undisputed Grettum is a general partner of TAG and under North Dakota law, notice to a partner is presumed notice to the partnership. N.D.C.C. § 45-13-02(6); *see* N.D.R.Civ.P. 4(d)(2)(D) (stating

a partnership may be served by service to a partner). Considering TAG had no address provided in the option agreement, sending notice to Grettum was certainly reasonable.

[¶13] TAG also asserts Wylie was not in precise compliance with the provision that TAG would deliver a "continued abstract of title" to Wylie. TAG asserts Wylie was in possession of the abstract, but refused to look for it, requiring TAG to obtain a "new" abstract, rather than updating the "old" abstract. One portion of the option agreement refers to TAG paying for the "cost of continuing or preparing the abstract for WYLIE's initial title examination," adding ambiguity to the main premise TAG relies on. Nevertheless, on its face, the argument is still problematic. Nothing in the option agreement suggests exercise of the option was dependent upon the specifics of exactly how the abstract would be procured. Moreover, TAG has given no basis for there being a legal distinction between a "continued" abstract and a "new" abstract.

B

[¶14] TAG's primary argument is that the option contract required Wylie to "purchase" 20 acres by June 1, 1999 and Wylie failed to comply with the option by not tendering purchase money before the deadline expired. TAG cites a dictionary definition of purchase, "to acquire by paying money," to prove tender of money is necessary to effect a purchase. TAG also points out, in support of its argument, the option contains a "time is of the essence" clause. At the outset, we recognize the term "purchase" cannot narrowly be interpreted as always requiring tender of money. *See State v. Jackson*, 515 S.E.2d 386 (Ga. 1999) (defining purchase as

"'to obtain by paying or promising to pay a price'") (quoting *Northeast Factor & Discount Co. v. Mortgage Investments*, 131 S.E.2d 221 (Ga. 1963); N.D.C.C. § 41-01-11(32) (broadly defining purchase as "taking by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift, or any other voluntary transaction creating an interest in property"). We conclude the term "purchase" when construed in light of other provisions in the option agreement, does not require tender of money.

[¶15] A further discussion of option law resolves TAG's argument. An option agreement is a contract where the owner of property (optionor or option-giver) gives another (optionee or option-holder) the right to buy the property at a fixed price within a specified time on agreed terms. *Wessels v. Whetstone*, 338 N.W.2d 830, 832 (N.D. 1983). The owner does not sell the property, but sells to the other party the right, at the optionee's election, to demand the conveyance in the manner specified. *Id.* Put another way, "an option supported by consideration is irrevocable for the life of the offer." *Estate of Jorstad*, 447 N.W.2d 283, 285 (N.D. 1989).

[¶16] Since an option to purchase is merely an irrevocable offer for a limited time, the question is whether Wylie accepted TAG's offer, i.e., whether Wylie exercised the option to purchase. Contract law teaches acceptance comes in different forms, sometimes by performance and sometimes by a promise of performance, often depending upon what the offer specifies. *See Restatement*, Contracts 2d § 50 (1981) (concluding acceptance by performance requires at least part of the offer requests be performed or tendered, but acceptance by promise requires the offeree to complete every act essential to the making of the promise); 17A Am.Jur.2d *Contracts*, § 95 (1991) (stating "there are

various modes of acceptance which are equally conclusive upon the parties"). For instance in a bilateral contract, both parties mutually promise to do a future act and the consideration of the promise of one party is a promise on the part of the other. 17A Am.Jur.2d Contracts § 5. Acceptance in a bilateral contract may be by a promise. *See* 77 Am.Jur.2d *Vendor and Purchaser* § 56 (1997) (stating "if the acceptance requested and furnished is a promise, the contract to sell is bilateral, binding each party to perform his promise").

[¶17] Applying these basic rules to option law, we said in *Northwestern Bell Tel. Co. v. Cowger*, 303 N.W.2d 791, 795 (N.D. 1981), "[w]here the exercise of the option to purchase does not provide for payment of the purchase price coincident with the optionee's exercise of the option, the payment of the purchase price is merely an incident of performance of the bilateral contract created by the exercise of the option." As we said above, an option must be exercised within the time and upon the terms and conditions provided in the agreement. *Mason*, 303 N.W.2d at 558.

[¶18] As TAG points out, the option agreement required Wylie to "purchase 20 acres on or before June 1, 1999." However, under the heading, "Method of Exercise," the option agreement provided how the option was to be exercised:

> Exercise of this option to purchase shall be in writing either delivered to TAG in person or by certified mail prior to the expiration of the time granted by this option as hereinbefore set forth. WYLIE shall have the right to purchase the entire Property or as hereinafter specified portions of the Property (hereinafter referred to as Individual

> Parcel(s)). The notice(s) to exercise the option may hence pertain to a portion thereof and during the term of this Option Agreement. WYLIE may exercise the option as to successive portions of the Property. The notice to exercise this Option Agreement as to an Individual Parcel shall adequately identify the Individual Parcel to be purchased. Following said notice, the area identified will be precisely surveyed for a correct legal description and for determination of the amount of acreage that would determine the purchase price for said Individual Parcel.

The plain language of the option agreement states the option is to be exercised by giving notice to TAG adequately identifying the individual parcel to be purchased. Nothing in the contract requires Wylie to tender the purchase price in order to exercise the option. Thus, tender of the purchase price is an incident of performance, not a condition precedent to the exercise of the option. Because Wylie gave notice to TAG, specifically identifying an individual parcel to be purchased, prior to the June 1, 1999 deadline, it complied with the option to purchase and the fact it did not tender purchase money prior to June 1, 1999 is irrelevant. Although the option agreement has a "time is of the essence" provision, it does not change the option contract into one requiring tender of payment for exercise of the option.

II

[¶19] TAG asserts Wylie failed to exercise the option because its May 25, 1999 letter was only a conditional acceptance, because Wylie could "get out" of the contract if necessary. It is not clear whether TAG is attacking Wylie's acceptance as conditional or whether TAG also challenges

the written option agreement as conditional, but we will consider both arguments.

[¶20] As noted in section I, the exercise of an option must be unconditional. *Mason*, 303 N.W.2d at 558. An optionee must exercise the option within the time and upon the terms and conditions provided in the agreement. *Id.* An attempt to exercise an option that deviates from the terms of the option acts as a rejection of the option and counter-offer. *Id.* Wylie's exercise of the option was unconditional. As the option specified, it gave notice to TAG, specifically identifying an individual parcel to be purchased, prior to the June 1, 1999 deadline. Wylie did not attempt to deviate from the terms of the agreement.

[¶21] TAG suggests Paragraph 13 of the option agreement, which allowed Wylie to void the agreement if several contingencies were not satisfied, gave Wylie the ability to void the agreement at its whim. Thus, they apparently contend, the agreement was conditional and therefore unenforceable. Paragraph 13 states in relevant part:

> If the abstract of title fails to disclose the *title of TAG to be good and marketable or if there are easements, restrictive covenants or mineral grants and reservations of record not acceptable to Buyer as permitted encumbrances, or if there are building zoning laws, ordinances or state and/or federal regulations that would hinder Buyer's intended use of the Property, WYLIE, at WYLIE's election, may declare this option and the exercise or partial exercise thereof null and void*, or WYLIE may offer TAG a reasonable time (but not more than 120 days) in which to make the title good and marketable or the concerns as to the acceptability of easements, restrictive covenants or mineral grants and reservations of record and

> building and zoning laws, ordinances and state and federal regulations addressed to Buyer's satisfaction. No objection can be raised, however, for matters stated to be acceptable in paragraph 19 below. If TAG agrees to attempt to cure the defects, TAG shall use due diligence in the effort to do so. If TAG does not undertake to make the title good and marketable and/or acceptable or is unable to make the title good and marketable and/or acceptable within such reasonable time as granted by WYLIE, it shall be at the option of WYLIE either to accept the title in its existing condition with no further obligation on the part of TAG to correct any defect or again have the right to declare its exercise of this Option Agreement void as to the Individual Parcel selected or to declare the entire Option Agreement void. Any Option Money paid or amount paid for Street Assessment theretofore shall be refunded to WYLIE should WYLIE select the latter option.

(emphasis added). Such "satisfaction" clauses are commonplace in contracts and do not cause the agreement to lack mutuality because, as shown below, an objective standard is nearly always employed in interpreting them. 13 Richard A. Lord *Williston on Contracts* § 38.22 (4th ed. 2000).

[¶22] One treatise says of such clauses:

> Since, however, such a promise is generally considered as requiring a performance which must be satisfactory to him or her in the exercise of honest judgment, such contracts have been almost universally upheld. Because of the duty to act in good faith, a party's promise is not illusory; rather, the restraint that the obligation to act in good faith places on the promisor's discretion

> furnishes good consideration for the parties' agreement.

Id. at § 38.21. According to the Restatement:

> When it is a condition of an obligor's duty that he be satisfied with respect to the obligee's performance or with respect to something else, and it is practicable to determine whether a reasonable person in the position of the obligor would be satisfied, an interpretation is preferred under which the condition occurs if such a reasonable person in the position of the obligor would be satisfied.

Restatement (Second) of Contracts § 228. American Jurisprudence states, "If a contract contains a promise by the vendor to sell and one by the purchaser to buy, the fact that it contains a conditional option to one of the parties to rescind does not destroy its mutuality." 77 Am.Jur.2d *Vendor and Purchaser* § 31.

[¶23] This Court has recognized an objective standard is necessary in interpreting clauses similar to those in this case. In *Industrial Com'n v. McKenzie County Nat.*, 518 N.W.2d 174 (N.D. 1994) one party argued an insurance contract was unenforceable because the policy required "good and marketable title" and the failure to have an easement recorded rendered title unmarketable. *Id.* at 178. This Court said marketable title is "one that is free from reasonable doubt." We further stated, "[w]e believe that reasonable persons could not differ that access to this property is free of reasonable doubt" and thus determined the contract should not be rescinded. *Id.*

[¶24] Although the option agreement had several contingencies, an objective standard would be employed to interpret these provisions, if necessary. Wylie had a good-faith

duty to only raise reasonable objections. If it attempted to void the contract at its whim, TAG would have legal recourse to a court which would apply an objective standard to the contract terms. Wylie could not rescind the contract at its whim and the contract is not conditional or illusory.

[¶25] We affirm.

[¶26] Gerald W. VandeWalle, C.J.
Dale V. Sandstrom
William A. Neumann
Mary Muehlen Maring
Ronald L. Hilden, D.J.

[¶27] Ronald L. Hilden, D.J., sitting in place of Kapsner, J., disqualified.

STATE OF NORTH DAKOTA COUNTY OF CASS	IN DISTRICT COURT EAST CENTRAL JUDICIAL DISTRICT

Matrix Properties Corporation, formerly known as E.W. Wylie Corporation, a Minnesota corporation,

Plaintiffs,

vs.

TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota,

Defendants.

Civil No. CV-99-02045

ORDER

The above-captioned matter came on for hearing before the Court on the 22d day of June, 2000, on Plaintiff's Motion For An Order Declaring that Plaintiff Owes No 2000 Option Money. Sidney J. Spaeth of Vogel, Weir, Hunke & McCormick, Ltd., appeared on behalf of plaintiff. Jonathan T. Garass of Garaas Law Firm, appeared on behalf of defendants.

The Court, having reviewed the memoranda of law, heard the arguments of counsel, and being fully advised in the premises;

It is hereby **ORDERED** that:

The Court declares that pursuant to the terms of the 1996 Option Agreement, Plaintiff is not obligated to make

any Option Payments to defendant to retain rights under the Option Agreement and that Plaintiff's valid and timely exercise of the option in July of 1999 created a binding executory contract for the purchase and sale of real property as found by prior Order of this Court.

Dated this 26 day of June, 2000.

BY THE COURT:

/s/ Frank Racek
Judge of District Court

Filed 12/12/00 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2000 ND 213

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation, Plaintiff and Appellee

v.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota, Defendants and Appellants

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20000192

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Frank L. Racek, Judge.

AFFIRMED.

Per Curiam.

Sidney J. Spaeth, Vogel, Weir, Hunke & McCormick, Ltd., P.O. Box 1389, Fargo, N.D. 58107-1389, for plaintiff and appellee.

Jonathan T. Garaas, Garaas Law Firm, DeMores Office Park, 1314 23rd Street South, Fargo, N.D. 58103-3796, for defendants and appellants.

Matrix Prop. Corp. V. TAG Investments
No. 20000192

Per Curiam.

[¶1] TAG Investments and James A. Grettum appealed from a district court's post-judgment order determining that its prior judgment, as affirmed by this Court in *Matrix Properties Corp. v. TAG Investments,* 2000 ND 88, 609 N.W.2d 737, required TAG and Grettum to transfer property in accordance with Matrix Properties Corporation's exercise of an option under the parties' 1996 agreement. We summarily affirm under N.D.R.App.P. 35.1(a)(1). Double costs are awarded to Matrix under N.D.R.App.P. 38 and 39. We further direct the district court to order specific performance requiring TAG and Grettum to convey the subject property upon tender by Matrix of the purchase price set in the 1996 option agreement.

[¶2] Gerald W. VandeWalle, C.J.
Dale V. Sandstrom
William A. Neumann
Mary Muehlen Maring
William F. Hodny, S.J.

[¶3] The Honorable William F. Hodny, S.J., sitting in place of Kapsner, J., disqualified.

Filed 7/13/01 by Clerk of Supreme Court

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2001 ND 128

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation, Plaintiff and Appellee

v.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota, Defendants and Appellants

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20010060

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable Frank L. Racek, Judge.

AFFIRMED.

Per Curiam.

Sidney J. Spaeth, Vogel, Weir, Hunke & McCormick, Ltd., P.O. Box 1389, Fargo, N.D. 58107-1389, for plaintiff and appellee.

Jonathan T. Garaas, Garaas Law Firm, DeMores Office Park, 1314 23rd Street South, Fargo, N.D. 58103-3796, for defendants and appellants.

Matrix v. TAG Investments
No. 20010060

Per Curiam.

[¶1] TAG Investments and James A. Grettum appealed from district court post-judgment orders issued after this Court affirmed an earlier post-judgment order and judgment in *Matrix Props. Corp. v. TAG Invs.*, 2000 ND 213, 622 N.W.2d 432, and *Matrix Props. Corp. v. TAG Invs.*, 2000 ND 88, 609 N.W.2d 737. We affirm under N.D.R.App.P. 35.1(a)(1) and (7). Double costs are awarded to Matrix under N.D.R.App.P. 38 and 39.

[¶2] Gerald W. VandeWalle, C.J.
Dale V. Sandstrom
William A. Neumann
Mary Muehlen Maring
William F. Hodny, S.J.

[¶3] The Honorable William F. Hodny, S.J., sitting in place of Kapsner, J., disqualified.

IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

E. W. Wylie Corporation, a Minnesota Corporation, Plaintiff, -vs- TAG Investments, a North DakotaPartnership, and James A. Grettum,an Individual Resident of NorthDakota, Defendants.	) CV-99-2045

Memorandum Opinion on Plaintiff's Motion for Summary Judgment & Defendants 12(b) Motion for Dismissal

I. Introduction

The above-encaptioned matter came before the Court on competing motions for judgment on the 6th day of October, 1999. The Plaintiff appeared through their corporate representative Rob Lyngstad and their counsel of record, Sidney Spaeth of Fargo, North Dakota. The Defendant James A. Grettum appeared personally and is his capacity as a general partner for TAG Investments and through his counsel, David Garaas and Jonathan Garaas of Fargo, North Dakota.

This matter was commenced by service of a summons and complaint on July 9, 1999. The Defendants interposed an Answer and Counterclaim on the 29th of July, 1999.

On August 20, 1999, the Plaintiff moved for summary judgment. On September 17, 1999, the Defendants filed a Brief in Resistance to Motion for Summary Judgment and moved, under Rule 12(b) of the North Dakota Rules of Civil Procedure, for entry of a Judgment of Dismissal of all claims of Plaintiff.

A hearing was conducted on October 6, 1999. The Court, being fully informed in the premises, now renders this Opinion.

Because the Court is convinced that there are no questions of material fact and that the Plaintiff is entitled to judgment as a mater of law, hereby GRANTS Plaintiff's Motion for Summary Judgment and DENIES Defendant's Motion for Dismissal.

II. Facts

While the legal consequences of the facts are seriously disputed by the parties, the facts themselves are relatively straight forward and not the subject of dispute. E.W. Wylie (now known as "Matrix, Inc.") purchased from TAG Investments certain real estate located in Fargo, North Dakota in October of 1996. As a part of this transaction, E.W. Wylie also purchased from TAG Investments an option to purchase 114 acres of additional land located in Fargo. *Affidavit of Rob Lyngstad*, ¶ 2, E.W. Wylie v. TAG Investments, et al, CV-99-2054, Clerk's Docket #8 (Aug. 18, 1999). The option was executed in the form of a document entitled "Option to Purchase" dated October 14, 1996. *Id.* The Option to Purchase gave to E.W. Wylie the option to purchase the 114 acres, or portions thereof, at the price of $9,375 per acre. *Id.* at Exhibit "A" ¶¶ 1-2. The time established for E.W. Wylie to exercise its option was

"for the period of time from the date hereof to the 1st of June, 2001 at 5:00 p.m. *Id.* at Exhibit "A" ¶ 3. The Option to Purchase required E.W. Wylie to make certain minimum purchases by certain dates in order to maintain the option. *Id.* at Exhibit "A" ¶ 6. Under the terms of the agreement, E.W. Wylie was to purchase at least 20 acres before June 1, 1999 and at least an additional 20 acres before June 1, 2000. *Id.* Thus, in order to preserve the option E. W. Wylie was required to purchase a minimum of 40 acres before June 1, 2000.

The method of exercising the option was set forth in the Option to Purchase. Paragraph 4 of the Option to Purchase provides:

> **4. *METHOD OF EXERCISE:*** Exercise of this option to purchase shall be in writing either delivered to TAG in person or by certified mail prior to the expiration of the time granted by this option as hereinbefore set forth. WYLIE shall have the right to purchase the entire property or as hereinafter specified portions of the Property (hereinafter referred to as Individual Parcel(s)). The notice(s) to exercise the option may hence pertain to a portion thereof and during the term of this Option Agreement as to an Individual Parcel shall adequately identity the Individual Parcel to be purchased. Following said notice, the area identified will be precisely surveyed for a correct legal description and for determination of the amount of acreage that would determine the purchase price for said Individual Parcel.

Id. at Exhibit "A" ¶ 4. Once the option was exercised, TAG was required to provide an abstract of title to E. W. Wylie. *Id.* at Exhibit "A" ¶ 13. If no objections to title were raised by E.W. Wylie, "the closing shall occur within forty-five

(45) days of said notice of exercise of this Option Agreement or partial exercise as to an Individual Parcel(s), unless such time shall be extended by the mutual consent of the parties." *Id.* at Exhibit "A" ¶ 14. If there were objections to title, TAG had 120 days to clear the defect. *Id.* at Exhibit "A" ¶ 13. If title defects arose, closing would occur within five (5) days of the time that the title defect had been cleared. *Id.* at *Exhibit* "A" ¶ 14.

On April 28, 1999 E.W. Wylie informed James Grettum, a general partner in TAG Investments, in writing, that "prior to June 1, 1999 we will be notifying you regarding our intent to option at least 20 acres in the south portion of Tract II. We will provide you with a detailed legal description at that time." *Id.* at Exhibit "B".

On May 26, 1999, E.W. Wylie exercised the option by providing written notice by certified mail to James A. Grettum and TAG Investments that it was exercising its option to purchase 21.82 acres in the South portion of Tract II. *Id.* at Exhibit "C". Attached to the letter was a "Certificate of Survey" by Ulteig Engineering describing the property to be purchased as:

> The South 721.58 feet of the southeast quarter of the southwest quarter of Section 22, Township 139 North, Range 49 West, of the Fifth Principal Meridian, Cass County, North Dakota. Containing 21.82 acres more or less and subject to all existing easements and rights of way.

Id. The letter also requested that TAG provide E.W. Wylie with an updated abstract of title that would "match the legal description on the enclosed Certificate of Survey." *Id.*

An abstract of title was obtained on or about June 14, 1999. E.W. Wylie proceeded to obtain a title opinion and

identified a defugalty in the recording documents. The ambiguity required the execution of quit claim deeds by an underlying optioner and TAG's two other general partners – Thomas Richards and R. Allan Rostad. TAG cooperated in the execution of the necessary documents before June 25, 1999. *Id.* at ¶ 6.

For reasons which have not been fully explained, TAG Investments transferred all of their interest in the 21.82 acres to James Grettum on June 22, 1999. This transfer was made without giving any notice or explanation to E.W. Wylie.

During the course of preparing for the closing E. W. Wylie discovered that the transfer had been made to Grettum. They made reasonable inquiries of TAG Investments and were informed that the transfer was made for internal purposes of TAG Investments and would not affect closing or transfer of the property to E.W. Wylie.

The closing was scheduled to take place on the morning of Monday, June 28, 1999. On Friday, June 25, 1999 at about 4:30 p.m. James Grettum hand delivered a letter to E.W. Wylie. The letter purported to "set forth my position, and TAG Investment's position, in reference [to the identified 21.82 acre parcel of land.]" *Id.* at Exhibit "H".

The letter went on to inform E.W. Wylie:

> I became the owner of the above described real property on June 22, 1999, pursuant to a Warranty Deed given by TAG Investments, a North Dakota General Partnership. At the time I was deeded the above described property, TAG Investments determined it was completely free of any further obligations under an Option to Purchase executed by TAG Investments, as Optioner,

to E.W. Wylie Corporation, as Optionee, on October 14, 1996. TAG Investments believed that E.W. Wylie Corporation lost its interest in the Option to Purchase by not timely purchasing 20 acres on or before June 1, 1999. The Option to Purchase is quite clear that it was subject to an obligation on the part of E.W. Wylie Corporation to purchase 20 acres before that date and that "time was of the essence" in the Option to Purchase.

As the grantee of TAG Investments, a general partnership, I will be prepared to strive to smooth and clear the muddy waters between TAG Investments and E.W. Wylie Corporation. I am willing to allow E.W. Wylie Corporation to purchase the above-described real property that had been deed[ed] me by TAG Investments, a general partnership.

Presently I am not prepared to sell at this time unless the following terms and conditions are also agreed to by E.W. Wylie Corporation:

1. The purchase price for the sale of the 21.82 acres will be $187,500.00, less any amount the City of Fargo may pay me for a road right of way;

2. E.W. Wylie Corporation must acknowledge, in writing and in a recordable format, that the Option to Purchase dated October 14, 1996, is no longer in force or effect, and that it has been terminated by its own provisions because of the failure of E.W. Wylie Corporation to make the minimum purchase of 20 acres by June 1, 1999;

3. The closing be structured in such a manner that I can take advantage of a Section 1031 like-kind tax free exchange;

4. The closing take place on or before July 12, 1999, and I will not be required to do any corrective title work. E.W. Wylie Corporation must accept the property subject to all matters of record on June 2, 1999.

Kindly advise me if these terms are acceptable if E.W. Wylie continues to desire to purchase the above described real property. I am signing this letter individually, and as general partner of TAG Investments, to set both my individual position and the position of the partnership with reference to all matters stated herein.

Very truly yours,

/s/
James A. Grettum

Id. at Exhibit "H".

The closing of June 28, 1999, was something of a circus, with Mr. Lyngstad tearing up the Grettum letter and informing Grettum, his lawyers, and his agents that the attempt by TAG Investments to avoid the Option to Purchase was a legal nullity. *Id.* at ¶ 15. Attention then turned to the closing documents, where E.W. Wylie inscribed the following:

By signing this closing statement and receiving [t]he deed hereunder, E.W. Wylie Corp. does not accept, and in fact, expressly rejects, the statements and conditions attempted to be unilaterally imposed on this transaction pursuant to a letter

> from James A Grettum to E.W. Wylie Corporation dated June 25, 1999 and E.W. Wylie expressly reserves full rights under the Option to Purchase between it and TAG Investments, as originally executed.

Id. at Exhibit "I".

At that point Grettum proceeded with the sale of the 21.82 acres and accepted and cashed the check of E.W. Wylie. *Id.* at ¶ 16. Closing occurred 34 days after E.W. Wylie exercised its option on the 20 acre purchase, well within the 45 day period allowed by the Option to Purchase.

Realizing the legal quagmire into which they had been thrust, E.W. Wylie sent certified letters to TAG Investments and James Grettum on July 1, 1999 and July 2, 1999, respectively, exercising its option to purchase the remaining portion of the option property. *Id.* at ¶ 17 and Exhibit "J".

TAG Investments and James Gretturn responded on July 6, 1999, declaring that they considered themselves "completely free of any further obligations" under the Option Agreement. *Id.* at Exhibit "K". The letter stated that E.W. Wylie "lost its interest in the Option to Purchase by not timely *purchasing* 20 acres on or before June 1, 1999." *Id.* (emphasis in original). The letter further cited *The New Lexicon Webster's Dictionary of the English Language* (1989) as standing for the proposition that the English language plainly and unambiguously means "to acquire by paying money." TAG Investments and James Grettum assert that the failure to pay the purchase price before June 1, 1999 caused the Option to Purchase to lapse by its own terms on June 1, 1999 and that they were

under no obligation to sell E.W. Wylie anything, including the 21.82 acres that Grettum transferred on June 28, 1999.

The Plaintiff contends that they properly exercised the option to purchase the entire tract of land and that Defendants are obligated to perform under the Option to Purchase dated October 14, 1996.

The Defendants argue that the October 14, 1996 Option to Purchase lapsed by its own terms on June 1, 1999. They assert in support of this argument:

(1) The term "purchase" is clear and unambiguous and means "to acquire by paying money,"

(2) The Option to Purchase contains [two] paragraphs, 13 and 20 which render the contract illusory; and

(3) If the definition of "purchase" is as asserted by the Plaintiff, it is impossible for the transaction to be treated as a tax free exchange under the Internal Revenue Code rendering the exercise by E. W. Wylie a material breach of the Option to Purchase which clearly contemplates that the parties act in a manner such that favorable IRS treatment can be received.

III. Discussion

1. Summary Judgment Generally

Under Rule 56, N.D.R.Civ.P., a summary judgment should be granted only if it appears that there are no issues of material fact or any conflicting inferences which may be drawn from those facts. *See, Production Credit Ass'n of Minot v. Klein*, 385 N.W.2d 485 (N.D. 1986). The party seeking summary judgment has the burden to clearly

demonstrate that there is no genuine issue of material fact. *Binstock v. Tschider*, 374 N.W.2d 81, 83 (N.D. 1985). In considering a motion for a summary judgment, the court may examine the pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from the evidence to determine whether summary judgment is appropriate. *Everett Drill. Vent v. Knutson Flying Serv.,* 338 N.W.2d 662, 664 (N.D. 1983). The court must view the evidence in a light most favorable to the party opposing the motion and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the evidence. *See, Stokka v. Cass Cty. Elec. Co-op, Inc.*, 373 N.W.2d 911 (N.D. 1985). Courts must also consider the substantive standard of proof at trial when ruling on a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); *State Bank of Kenmare v. Lindberg*, 471 N.W.2d 470, 474 (N.D. 1991).

The resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other documents containing testimony or evidence raising an issue of material fact. *Smith v. Land O'Lakes*, 1998 ND 219, ¶ 10; 587 N.W.2d 173 (N.D. 1998). Neither the trial court, nor an appellate court has a duty or responsibility to search the record for evidence opposing the motion for summary judgment. *Id.*

Summary judgment is proper when a party fails to raise even a reasonable inference of the existence of an element essential to the party's claim, which must be proved at trial. *Matter of Estate of Stanton*, 472 N.W.2d

741 746 (N.D. 1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

In the instant case all parties agree that there are no questions of fact and that this case is appropriately determined on the pleadings. The Court agrees.

A. The Nature of the Option and its Exercise

The option in this case is a contract in the nature of a formal offer by TAG Investments to sell certain described real estate, totaling 114 acres, to E.W. Wylie Corporation for the sum of $9,375 per acre. The option was supported by consideration in the form of money. E.W. Wylie paid an annual fee to maintain the option. In addition to the general offer to sell the entire 114 acre parcel, the option required that E.W. Wylie make minimum purchases of 20 acres by June 1, 1999, and an additional 20 acres by June 1, 2000 (for a total minimum interim purchase[ ] of 40 acres). If the minimum purchases were made, the entire option had to be exercised by June 1, 2001, by 5:00 p.m.

Thus, the option was in the nature of an offer which could be accepted by E.W. Wylie by exercising the option consistent with its terms (including the minimum purchases).

Paragraph 4 of the Option to Purchase provides that "exercise of this option to purchase shall be in writing either delivered to TAG in person or by certified mail prior to the expiration of the time granted by this option as hereinbefore set forth." Option to Purchase, ¶ 4.

It is undisputed that on May 25, 1999, Rob Lyngstad in his capacity as Vice President of the Plaintiff, sent, by Certified Mail, a letter wherein E.W. Wylie indicated that

it was exercising its option to purchase 21.82 acres of the "South portion of Tract II." The land was specifically described as required by the Option to Purchase. It is not open to dispute that this occurred before June 1, 1999.

At the outset it should be noted that TAG Investments asserts that the letter of May 25, 1999, is ineffective as an exercise of the Option to Purchase because it was sent to James Grettum at his place of business and because the letter was addressed to James Grettum, CPA, Grettum and Company, PO Box 9121, Fargo, ND 58103. James Grettum has admitted in his Answer and Counterclaim that he is a general partner in TAG Investments. *Answer and Counterclaim*, ¶ 2, E.W. Wylie v. TAG Investments, et al., CV-99-2054, Clerk's Docket #4 (July 28, 1999).

North Dakota law provides that notice is given to a partnership when it is given " . . . to a partner of a partnership when in writing and mailed or delivered to the partnership or to a partner at the chief executive office of the partnership." N.D. CENT. CODE § 45-13-01(8)(a) (Supp. 1999). The Century Code further states that "a person receives a notification when the notification comes to the person's attention or is duly delivered at the person's place of business . . . " N.D. CENT. CODE § 45-13-02(4) (Supp. 1999). The Rules of Civil Procedure also allow for the service of process on a general partner of the partnership. Rule 4, N.D.R.Civ.Pro. (1999).

James Grettum has admitted receiving the May 25, 1999, letter and has attached a copy of it to the Defendants Answer and Counterclaim. *Answer and Counterclaim.* ¶¶ 6-7, E.W. Wylie v. TAG Investments, et al., CV-99-2054, Clerk's Docket # 4 (July 28, 1999). The record is silent as to the "chief executive office of the partnership."

However, given the nature of the partnership as an investment partnership, it seems unlikely that it has a regular place of business. The Option to Purchase has an address for E.W. Wylie but is silent as to the address for TAG Investments, thus it appears that the parties believed *ab initio* that service of the notice of exercise of option could be made by giving notice to any of the general partners.

In view of the facts and circumstances in this case, including Mr. Grettum's admission that he received the letter of May 25, 1999, the Court has no difficulty determining that the manner of the exercise of the option, that is by sending a certified letter to Mr. Grettum, was appropriate.

B. Are Defendants Correct in their Assertion that Payment is Synonymous with Purchase?

The main thrust of the Defendants' argument is that the term "purchase" is clear and unambiguous and that it means "to acquire by paying money." The sole authority for this proposition is *The New Lexicon Webster's Dictionary of the English Language* (1989). While a case precisely on all fours has not been decided by the North Dakota Supreme Court, the Court has stated:

> Where the exercise of an option to purchase does not provide for payment of the purchase price coincident with the optionee's exercise of the option, the payment of the purchase price is merely an incident of performance of the bilateral contract created by the exercise of the option.

Northwestern Bell Telephone Co., v. Cowger, 303 N.W. 2d 791, 795 (N.D. 1981). It is clear that the Option to Purchase

in this case does not require payment coincident with exercise of the option, the document plainly allowing that the closing (the time at which the money is exchanged for the deed) must occur within 45 days following exercise of the option (and up to 125 days if a title problem needs to be resolved). Thus, under North Dakota law it would appear plain that in this case "payment of the purchase price is merely an incident of performance of the bilateral contract created by the exercise of the option."

This is consistent with the North Dakota Supreme Court's ruling in *Kuhn v. Hamilton*, 117 N.W.2d 81 (N.D. 1962), wherein the Court stated, "In *Horgan v Russell*, 140 N.W. 99 (N.D. 1913), we held that acceptance of an offer or option which results in a contract so brought into being are different matters." *Kuhn* at 117 N.W.2d 83. In *Kuhn* the Court went on to state:

> On the other hand, there are many cases where the option may be exercised in parol or by any other method indicating an election to take that land – the payment of the purchase price and the making of the deed being subsequent matters in performance of a binding contract. In the one case there is an election to sell upon payment of the purchase price, which is a condition precedent to the foundation of the contract; and on the other, there is an election to take the land upon the terms proposed; payment of the purchase price being condition subsequent, or rather the performance of an executory contract therefore entered into.

Id. at 83-84 (citing *Horgan v Russell*, op. cit.). This is consistent with the North Dakota Supreme Court's holding in *Olson v. Bradawl*, 123 N.W.2d 169 (N.D. 1961) where

the high court stated that the exercise of an option creates an executory bilateral contract. *Id.* at 178.

Thus, it seems plain under the precedent of North Dakota, that an option is in the nature of an irrevocable offer to be bound, supported by consideration, which may be accepted by exercise of the option. The exercise of the option gives rise to an executory contract. In this case, the nature of the executory contract is defined by the terms of the Option to Purchase which allowed 45 days to close the deal from the date of the exercise of the option.

This view is consistent with decisions from other jurisdictions. In *Loose v. Brubacher,* 549 P.2d 991 (Kan. 1976) the Kansas Supreme Court confronted a case somewhat similar to the case at bar. The Kansas high court noted, "[p]ayment or tender of the contract price is not essential to acceptance, unless the option agreement makes it a condition precedent to or a part of or necessary to the exercise of the option. In such a case payment may be made within a reasonable time after acceptance." *Id.* at 996.

In *Loose* the argument was advanced, as it is in the case at bar, that "time is of the essence" in option contracts. The Kansas court agreed stating "[t]ime has been held to be of the essence in an option agreement whether or not so expressed and the optionee must accept in the time specified in order to bind the optioner to the contract of sale." *Id.* at 996.

It can not be disputed in this case that time is of the essence, as the Option to Purchase specifically provides that it is. Paragraph 21 of the Option to Purchase provides:

> **21. TIME OF THE ESSENCE:** The parties expressly agree that time shall be of the essence in the performance of the parties under this agreement.

In order to understand the impact of this provision, one needs to consider the "performance" considered under the option agreement. At this point the case diverges from many reported option cases. *See*, *Loose v. Brubacher*, 219 Kan. 727; 549 P.2d 991 (Kan 1976) (time of the essence in the exercise of option not in performance of the contract); *See also*, *Northern Illinois Coal Co. v. Cryder*, 197 N.E. 750 (Ill. 1935) ("Time was of the essence of the option but was not of the essence of the performance of the contract."). In this case the option agreement sets forth a clear timeline of the contemplated performance. The essential parts of the agreement are:

1. On or before June 1, 1999, E.W. Wylie was required to exercise the option to purchase of a minimum of 20 acres as an identified parcel;

2. Within 10 days TAG Investments was to deliver an updated abstract of title to the identified parcel;

3. E.W. Wylie had 15 days from the date of delivery of the abstract of title to determine whether the title was good and marketable and free from defects;

4. Closing must occur within 45 days of the date of exercise of the option unless there were title defects in which case TAG Investments had a reasonable time not to exceed 120 days to cure title defects. If there were title defects closing would occur within five days of the date that the defects were cured.

It appears to the Court that these were the matters for which time was of the essence as each are essential in closing the entire arrangement in a timely fashion. In reviewing the evidence it is clear that (1) E.W. Wylie exercised the option by its correspondence of May 25, 1999, before June 1, 1999; (2) the abstract was obtained within a reasonable time; (3) E.W. Wylie notified TAG Investments of the defects of title within 15 days of the date that they received the abstract of title; (4) TAG Investments cleared all title questions by June 25, 1999; (5) closing occurred on June 28, 1999. Thus, the entire process from the date of exercise until the date that the transaction was closed took 34 days, well within the 45 days allowed by the option agreement. The Option to Purchase clearly states that closing could occur at any time up to 45 days after the exercise of the option, thus, even reading the "time of the essence" clause in a light most favorable to TAG Investments and against E.W. Wylie reveals that the time concerns of the optioners were met. The optioners made an offer wherein they agreed that the optionees would have forty-five days from the date of exercise of the option to close the transaction. This time frame was met in the instant case, even though there were defects of title that needed to be cured. These defects of title were cured by TAG Investments on June 25, 1999 and on June 28, 1999 the transaction was closed, well within the five day period allowed for closing after the title defects had been resolved. Thus, it is apparent that all of the necessary performance by E.W. Wylie was accomplished within the time parameters set forth in the Option to Purchase. Thus, any claim that the payment in the case at bar was not made timely and that payment was contrary to the time of the essence clause is without merit.

In considering the dispute regarding "purchase" means "payment", it is important to bear in mind the legal impact of the notice of intent to exercise an option. As the Kansas Supreme Court went on to state in *Loose v. Brubacher,* "a majority of jurisdictions including Kansas have held that notice of an intent to exercise an option is sufficient to bind the optioner." *Id.* at 996. This conclusion directly related to the claim of Brubacher that the option could only [be] exercised by tender of the purchase price.

Likewise, the South Dakota Supreme Court has indicated that "payment and purchase are not synonymous terms." *Schull Construction Co. v. Webster Ind. School Dist. 101*, 198 N.W.2d 512, 516 (S.D. 1972). As the South Dakota Court noted, "there is a clear distinction between payment and purchase. Payment extinguishes and discharges an indebtedness; purchase transfers title thereto the payor or nominee." *Id.*

Regardless of the dictionary definition, the law does not view the term "purchase" in a colloquial sense, it is a legal term with a precise legal meaning. In the law relating to option contracts, purchase and payment are not synonymous terms. Purchase in an option context means an irrevocable acceptance of the offer by exercise of the option consistent with its terms. This act irrevocably binds the parties and has the impact of transferring equitable title in the underlying real estate to the optionee. In the case at bar, E.W. Wylie had until June 1, 1999 to exercise the option by forwarding the appropriate notice, clearly indicating its willingness to be bound and plainly describing at least a 20 acre parcel to be purchased. This E.W. Wylie did. Having exercised the option, they were required to close the purchase within 45 days. They closed within 34 days, well within the time allowed for performance.

This is made even more plain by reducing this option to its legal consequences. First, the option was an offer, bound by consideration, irrevocable during the time of its existence, to sell certain real estate to E.W. Wylie for a specified price. The option expressly allowed that the minimum purchase had to be exercised by June 1, 1999. E.W. Wylie exercised the option on May 25, 1999 by forwarding a letter, by certified mail, to James Grettum a general partner of TAG Investments. The exercise constituted an acceptance of the offer of TAG Investments to sell and the creation of an enforceable obligation on the part of E.W. Wylie to buy 21.82 acres of land located in Tract II for the sum of $9,375 per acre. Once the exercise of the option occurred an executory contract arose. The terms of the executory contract were, as previously indicated, that TAG Investments agreed to sell 21.82 acres in Tract II to E.W. Wylie at the price of $9,375 per acre. The executory contract included a term that the transaction must close within 45 days. At the closing, the bargained for exchange must take place. That is, TAG Investments had to deliver a deed for the property and E.W. Wylie had to pay the agreed upon purchase price. All of these things occurred in natural order consistent with the terms of the executory contract. This executory contract was bilateral involving TAG's delivery of a deed and Wylie's payment of the purchase price. If the Option to Purchase and the executory bilateral contract are viewed in their proper legal place, it is apparent that the conduct of E. W. Wylie was entirely consistent with the express provisions of the Option to Purchase of October 14, 1999.

The Defendants' argument that the tender of the purchase price was required before June 1, 1999, is simply based on an incomplete understanding of the applicable

law, as is demonstrated by a close reading of *Kuhn* and the legal concepts which naturally flow from it.

C. Do Paragraphs 13 and 20 Render the Option Illusory?

Paragraph 13 of the Option to Purchase provides:

> **13. ABSTRACT OF TITLE.** Within 10 days after Wylie has exercised its option for the Property or for an Individual Parcel hereinabove provided, TAG shall deliver to WYLIE or WYLIE'S attorney, a continued abstract of title for the Property or for such Individual Parcel. TAG shall pay the cost of such abstract preparation(s). Said abstract(s) of title shall show TAG's title to be good and marketable subject only to restrictive covenants, mineral reservations and grants and easements of record (provided such are acceptable to Buyer as permitted encumbrances), as well as zoning ordinances and other governmental regulations affecting the Property. WYLIE shall then have 15 days after continuation of said abstract to examine the title and to accept the same if the title is good and marketable. If the abstract of title fails to disclose the title of TAG to be good and marketable or if there are easements, restrictive covenants or mineral grants and reservations of record not acceptable to Buyer as permitted encumbrances, or if there are building zoning laws, ordinances or state and/or federal regulations that would hinder Buyers's intended use of the Property, WYLIE at WYLIE's election, may declare this option and the exercise or partial exercise thereof null and void, or WYLIE may offer TAG a reasonable time (but not to exceed 120 days) in which to make the title good and marketable or the concerns as the acceptability of easements, restrictive covenants or

> mineral grants and reservations of records and building and zoning laws, ordinances and state and federal regulations addressed to Buyer's satisfaction. No objection can be raised, however for matters stated to be acceptable in paragraph 19 below. If TAG agrees to attempt to cure the defects, TAG shall use due diligence in the effort to do so. If TAG does not undertake to make the title good and marketable and/or acceptable or is unable to make the title good and marketable and/or acceptable within such reasonable time as granted by WYLIE, it shall be at the option of WYLIE either to accept the title in its existing condition with no further obligation on the part of TAG to correct any defect or again have the right to declare its exercise of this Option Agreement void as the Individual Parcel selected or to declare the entire Option Agreement void. Any Option Money paid or amount paid for the street Assessment theretofore shall be refunded to WYLIE should WYLIE select the latter option.

Defendants assert that the power granted to E.W. Wylie to void the exercise of its option after an examination of title is so broad as to render the entire option illusory. It is beyond dispute that Wylie has broad power under this provision to reject title as being unmarketable. However, this power is nowhere near as broad as asserted by the Defendants.

First, it is limited by Paragraph 19 of the Option Agreement. Paragraph 19 states that Wylie has examined the title on the date of the creation of the option and that it has found the title to be marketable. It also states that any easements, covenants, conditions and restrictions that would affect title to the property would have to be agreed to in writing by Wylie during the existence of the option.

Thus, many of the concerns considered in Paragraph 13 simply could not have arisen without the prior consent of Wylie which would obviously negate the ability of E.W. Wylie to object under paragraph 13.

It is also important to bear in mind that every contract[1] has within it, *implied in law*, a covenant of good faith and fair dealing.[2] Wylie was not free to erect pretended

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[1] This statement is perhaps overbroad. Contracts of employment do not contain the same covenants of good faith and fair dealing, implied in law, as other contracts. This is due to the fact that North Dakota is an "employee at will" state and the statutes of North Dakota specifically provide that one may be terminated from employment for any reason, or even no reason at all, so long as the reason is not unlawful. Thus, the implied covenant of good faith and fair dealing has only limited applicability in the employment arena – the legislature having limited the implied covenant by legislative dictate. Needless to say, this concept is not at issue in a case involving an option to purchase real estate.

[2] Unfortunately, the North Dakota Supreme Court in its opinion in *Barnes v. St. Joseph's Hospital*, 1999 N.D. 204, appears to intimate that the implied covenant in contract known as "the implied covenant of good faith and fair dealing" refers to a tort concept. The Court is not convinced that this is what the North Dakota Supreme Court meant to say. There is a tort cause of action, which has been recognized as an action for "breach of implied covenant of good faith and fair dealing" in a number of jurisdictions. This is a free standing tort action arising out of a contractual relationship and actually involves something akin to tortiously breaching a contract. This is not what the Court refers to today in this opinion. Rather there is an implied covenant of good faith and fair dealing implied in every contract. As the Supreme Court of North Dakota has noted, the contractual duty to "act in good faith 'does not obligate a party to accept a material change in the terms of the contract or to assume obligations that vary or contradict the contract's express provisions,' nor does the duty of good faith 'inject substantive terms into the parties' contract.'" *Barnes v. St. Joseph's Hospital*, 1999 N.D. 204 ¶ 14. Rather, the implied covenant of good faith and fair dealing implied in contracts by law requires that in the performance of the contract, one has an obligation to act in good faith, deal fairly with

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the other party and to use their best efforts in performance of the contract. This is a contract principle, not a tort principle, and it may be used to enforce the terms of the contract as it exists. The practical impact of this is that a party cannot act in bad faith, use less than best efforts, or deal unfairly in the performance of the contract to avoid the obligations imposed by the contract. In the case at bar this means that both parties must act with due diligence, in good faith and use their best efforts to comply with the terms of the contract. One simply cannot create straw obstacles and then claim they are not bound to perform the contract. The concept is, as the Court has noted three times now, a fundamental contract principle and not a separate free standing tort. For a discussion of this theory, the court commends *Amoco Oil Co. v. Ervin,* 908 P.2d 493, 498 (Colo. 1995) (recognizing the implied covenant in contract but denying the existence of the tort claim). As an aside, the Court notes that the implied covenant in contract is entirely consistent with the underlying contract principle of giving each party the benefit of their bargain. The tort theory of breach of implied covenant of good faith and fair dealing, however, is economically inconsistent with the fundamental principles covering contract law because rather than giving the parties the benefit of the bargain, the tort concept also includes the tort notion of allowing the recovery consequential damages – a wholly unproductive economic result. In allowing tortious breaches of contracts and awarding consequential damages, the law imposes a societal cost by increasing the damages in an economic setting which results in the cost of those damages being spread to all consumers of the goods and services involved. Because as a general principle consequential damages are limited in contract to those case[s] in which they were clearly contemplated by the parties at formation of the contract and foreseeable in the breach, the societal cost of damages is less in contract than in tort. There is a fundamental philosophical reason for this result: The law does not view the breach of a contract by a "dirty rotten breacher" as involving the same moral implications as the commission of a tort by a tortfeasor. Torts necessarily involve wrongful conduct, while the breach of a contract may be economically necessary and not involve any notion of underlying immorality. Thus, in contract, the goal is generally to give the non-breaching party the benefit of their bargain either in money damages or through specific performance. In tort, the goal is compensate an innocent party for *all* damages which flow naturally and proximately from the wrongful conduct. Thus, in this judge's opinion the mixing of tort and contract principles is an avenue fraught with danger, uneconomical, and harmful to the societal interest

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defugalities of title with a view to avoiding the exercise of their option, because to do so would violate the implied covenants of good faith and fair dealing. Any court that would have been confronted with a claim of defective title or that the property had been rendered unfit for the purposes intended by E.W. Wylie would have been empowered to examine the underlying basis for these claims and determine whether or not the claimed defects were real or simply a pretense for avoiding the consequences of the exercise of the option. Since the Court possesses the power to enforce the implied covenants, if E.W. Wylie had actually raised pretended defects of title as a pretense to avoid the legal consequences of an exercise of the option, TAG Investments would have been empowered to seek specific performance. Had they established that the claimed title irregularities were pretextual, they might have been entitled as a matter of law to specific performance as a remedy, but in any event they would have been entitled to money damages to give them the benefit of their bargain. In any event, the Court is convinced that the powers granted to E.W. Wylie under paragraph 13, while broad, are not of such a nature as to render the option agreement illusory.

The Defendants also assert that Paragraph 20 renders the option agreement illusory. Paragraph 20 is a liquidated damages provision which makes plain that if E.W.

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in providing goods and services at the least possible cost to consumers. Thus, an award of tort damages in a contract setting should be avoided except in those cases where the conduct is so egregious as to rise to the level of a tort which actually justifies the imposition of tort damages. The North Dakota Supreme Court has indicated in *Barnes* that this is [a] question that should wait for another day and so it must in this case as well.

Wylie fails to exercise the option they forfeit the option money paid and the money advanced for Street Assessment payments as liquidated damages. It simply states that the parties have tried to ascertain damages inherent in a breach, that it is impossible to do so in advance, and that they agree that all sums paid prior to a failure to exercise the option are forfeited upon said failure to exercise. The Court does not see how this provision, even if read in concert with Paragraph 13, can render the option agreement illusory.

E. Section 1031 of the Internal Revenue Code

The Defendants' further assert that if E.W. Wylie prevails in its interpretation of the issue relating to the synonymity of purchase and payment, Section 1031 of the Internal Revenue Code operates to bar the tax free exchange contemplated by the parties which would render the entire agreement void for a failure of consideration. The Court is of the opinion that the Section 1031 claim by the Defendants is an unmitigated red herring.

The IRS regulations concerning deferred exchanges discuss the taxpayer's duty to identify the like-kind exchanged property within 45 days and exchange the property within 180 days of the transfer of property. I.RC. §1.1031(k)-1(b)(2)(i) and (ii). At the outset it should be noted that the comments to the section plainly state that it is inapplicable to transactions in which property is exchanged for money. Clearly, nothing in this case ever contemplated that E.W. Wylie would ever have done a like kind exchange of property with TAG Investments rather than the payment of money. Thus, it is apparent from all the circumstances in this case that the applicability of

section 1031 required very delicate handling and planning. It appears to the Court that the federal tax regulations may allow Section 1031 to be used if the parties transfer the real property in question through a qualified intermediary. This E.W. Wylie was always ready willing and able to do. Frankly, this type of exchange appears to the Court to be quite arcane and possibly fraught with danger to the unwary, but if handled in a sophisticated manner it appears possible to accomplish. But, that does not change the circumstances that are apparent in the contract that the bargained for exchange was in fact a deed for cash.

Now, Defendants make much of the fact that E.W. Wylie had to cooperate with them to create a tax free exchange under Paragraph 28 of the Option to Purchase. The Court claims no expertise in the area of tax law, but its reading of the Code of Federal Regulations leads it to an apparently inescapable conclusion that by the time Mr. Grettum appeared at the closing, TAG Investments and Mr. Grettum had created, by their maneuvering, a problem with Section 1031 treatment for TAG Investments, if not for Mr. Grettum personally. The reasons for the transfer of the 21.82 acres to Mr. Grettum has never been adequately explained, and the record is silent as to whether or not he could be a qualified intermediary of TAG Investments, but a reading of the relevant regulations appears to yield the conclusion that this transfer of real estate might well have created a tax problem for the partners of TAG Investments, other than James Grettum. It all depends on how the underlying transaction between TAG Investments and James Grettum was structured. The Court has no information regarding the structure of this transaction, but the deed appears to raise some questions about whether or not it would still be possible for TAG

Investments to preserve their tax position once they transferred the property by warranty deed to James Grettum.

In any event, by the time the transaction was closed TAG Investments and James Grettum had created a potential problem with 1031 treatment; had never provided a reasonable explanation of how the closing could be structured to protect their tax position; and never provided clear direction on who was a qualified intermediary such that E.W. Wylie could assist in the preservation of their tax position. All of these point to a problem of the defendants own making. In *Barnes v. St. Joseph's Hospital,* 1999 N.D. 204, ___ N.W.2d ___ (N.D. 1999), the North Dakota Supreme Court stated: "This Court has recognized that each party to a contract impliedly agrees not to prevent the other party from performing and not to render performance impossible. *See, Cavalier County Memorial Hospital Ass'n v. Kartes,* 343 N.W.2d 781, 784 (ND 1984); *Ireland v. Charlesworth,* 98 N.W.2d 224, 233 (N.D. 1959). If one party prevents the other's performance, it excuses the performance and provides a defense in a suit for breach by such nonperformance." ¶ 16. By not providing E.W. Wylie with the information that they needed to protect the Defendants tax position, the Defendants breached the implied covenant recognized by the North Dakota Supreme Court in *Barnes* and *Kartes*. Simply put, by transferring the real estate to a person who might not be a qualified intermediary and by not providing E.W. Wylie with adequate information on which to act to preserve the Defendants' tax position, the Defendants excused compliance with this provision.

Even more importantly, the Court fails to see how the precise definition of "purchase" as being different than "a

paid for exchange" implicates TAG Investment's tax position in any manner. It appears that the actual sections of the C.F.R. in the Defendants brief have only limited applicability, and are unlikely to be determinative of the tax positions of TAG Investments. This picture is further complicated by the rather inexplicable transfer of the 21.82 acres by TAG Investments by warranty deed to James Grettum. As Mr. Grettum is a CPA the Court can only conclude that his expertise led him to some conclusion different than the Court. But for purposes of this discussion the tax position of TAG Investments is of no consequence, TAG Investments having failed to provide adequate direction to E.W. Wylie as to what steps they needed to take to protect TAG Investments tax position. Whatever, the ultimate result of this quagmire, it is not a problem of E.W. Wylie's making and it does not constitute a complete failure of consideration.

Under the circumstances present in this case, the Defendants' claim that Section 1031 of the Internal Revenue Code somehow renders the option void because of a complete failure of consideration is misplaced.

IV. Conclusion

The Plaintiff is entitled to judgment on their claim for specific performance as a matter of law, thus the Plaintiff's Motion for Summary Judgment is GRANTED. The Defendants' 12(b) Motion to Dismiss is DENIED.

ORDER

IT IS HEREBY ORDERED that Plaintiff's Motion for Summary Judgment on their claim for specific performance is GRANTED.

IT IS FURTHER ORDERED that Defendants' Motion to Dismiss is DENIED.

IT IS FURTHER ORDERED that the Plaintiff will prepare a judgment consistent with this Memorandum Opinion and that the judgment prepared will require the Defendants to specifically perform under the terms of the Option to Purchase dated October 14, 1996.

IT IS FURTHER ORDERED that the Plaintiffs are awarded their fees, costs and disbursements as allowable by law.

Dated this 27th day of October, 1999.

/s/ Ralph R. Erickson
Ralph R. Erickson
Judge of the District Court
East Central Judicial District

Supreme Court of North Dakota

OFFICE OF THE CLERK
600 E BOULEVARD AVE DEPT 180
BISMARCK ND 58505-0530
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CLERK OF THE SUPREME COURT
PENNY MILLER

CHIEF DEPUTY CLERK
COLETTE M. BRUGGMAN

June 5, 2002

Mr. Jonathan T. Garaas
Attorney at Law
Garaas Law Firm
DeMores Office Park
1314 23rd Street South
Fargo, ND 58103-3796

RE: Matrix Properties v. TAG Investments
Supreme Court No. 20010228

The Supreme Court entered an order today denying the petition for rehearing in this matter.

Pursuant to Rule 41(a), N.D.R.App.P., the mandate of the Supreme Court will be forwarded to the clerk of the trial court after the expiration of seven days.

Sincerely yours,

/s/ Penny Miller
Penny Miller
Clerk
North Dakota Supreme Court

PM:ml

pc: Mr. Sidney J. Spaeth
The Honorable Georgia Dawson

Supreme Court of North Dakota

OFFICE OF THE CLERK
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CLERK OF THE SUPREME COURT
PENNY MILLER

CHIEF DEPUTY CLERK
COLETTE M. BRUGGMAN

July 15, 2002

Mr. Jonathan T. Garaas
Attorney at Law
DeMores Office Park
1314 23rd St. S.
Fargo, ND 58103-3796

RE: Matrix Properties Corporation v.
JCG Investments, L.L.C, et al.
Supreme Court No. 20020011
Cass Co. No. 01-C-01052

The Supreme Court entered an order today denying the petition for rehearing in this matter.

Pursuant to Rule 41(a), N.D.R.App.P., the mandate of the Supreme Court will be forwarded to the clerk of the trial court after the expiration of seven days.

Sincerely yours,

/s/ Penny Miller
Penny Miller
Clerk
North Dakota Supreme Court

PM:ml

pc: Mr. Sidney J. Spaeth
The Honorable Cynthia Rothe-Seeger

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF CASS	EAST CENTRAL JUDICIAL DISTRICT

E.W. Wylie Corporation, a Minnesota corporation,	Civil No. CV-99-02045
Plaintiffs,	**JUDGMENT**
vs.	(Filed Nov. 2, 1999)
TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota,	
Defendants.	

In accordance with the Court's Memorandum Opinion on Plaintiff's Motion for Summary Judgment & Defendants 12(b) Motion for Dismissal, Order, and Order for Judgment dated October 27, 1999, granting summary judgment to Plaintiff E.W. Wylie Corporation, it is

ORDERED, ADJUDGED, AND DECREED that:

1) Plaintiff's Motion for Summary Judgment on their claim for specific performance is GRANTED;

2) Defendants' Motion to Dismiss is DENIED;

3) Defendants' are ordered to specifically perform under the Option To Purchase dated October 14, 1996.

4) Plaintiff is awarded its fees, costs and disbursements in the sum of $90.

WITNESS, The Honorable Ralph R. Erickson, and my hand and seal this 2d day of November, 1999.

/s/ Dorothy Howard
Dorothy Howard
Clerk of Cass County District Court
By: /s/ Linda Brook, Deputy

North Dakota Statutes:

28-26-01.Attorney's fees by agreement – Exceptions – Awarding of costs and attorney's fees to prevailing party.

1. Except as provided in subsection 2, the amount of fees of attorneys in civil actions must be left to the agreement, express or implied, of the parties.

2. In civil actions the court shall, upon a finding that a claim for relief was frivolous, award reasonable actual and statutory costs, including reasonable attorney's fees to the prevailing party. Such costs must be awarded regardless of the good faith of the attorney or party making the claim for relief if there is such a complete absence of actual facts or law that a reasonable person could not have thought a court would render judgment in their favor, providing the prevailing party has in responsive pleading alleged the frivolous nature of the claim. This subsection does not require the award of costs or fees against an attorney or party advancing a claim unwarranted under existing law, if it is supported by a good faith argument for an extension, modification, or reversal of the existing law.

28-05-07.Lis pendens – Effect.

In a civil action in a district court affecting the title to real property, the plaintiff, at the time of filing the complaint or at any time afterwards, or the defendant, when the defendant sets up in the defendant's answer an affirmative claim for relief affecting the title to real property and demands substantive relief, at the time of filing the defendant's answer or at any time afterwards, may file for record with the recorder of each county in which the real

property is situated a notice of the pendency of the action, containing the names of the parties, the object of the action, and a description of the real property affected. From the time of filing only shall the pendency of the action be constructive notice to a purchaser or encumbrancer of the property affected thereby, and every person whose conveyance or encumbrance is subsequently executed or subsequently recorded is deemed a subsequent purchaser or encumbrancer with notice and is bound by all proceedings taken after the filing of such notice to the same extent as if that person were a party to the action. For the purpose of this section an action is deemed to be pending from the time of filing such notice, but such notice is of no avail unless it is followed by the first publication of the summons, or by the personal service thereof on a defendant, within sixty days after such filing

---

28-20-11. How judgment entered – Notice when entered.

The judgment must specify clearly the relief granted or other determination of the action. An entry of the judgment must be made by the clerk in the register of civil actions. The entry of any judgment affecting the title or possession of real property, except judgments required to be docketed under the provisions of section 28-20-13, is not notice of its contents or constructive notice of such judgment to a subsequent bona fide purchaser or encumbrancer in good faith, and for a valuable consideration, until a certified copy of such judgment is recorded in the office of the recorder in the county in which such property is located.

28-20-34. Interest rate on judgments.

Interest is payable on judgments recovered in the courts of this state at the same rate as is provided in the original instrument upon which the action resulting in the judgment is based, which rate may not exceed the maximum rate provided in section 47-14-09. If such original instrument contains no provision as to an interest rate, or if the action resulting in the judgment was not based upon an instrument, interest is payable at the rate of twelve percent per annum and may not be compounded in any manner or form. Interest on all judgments recovered in the courts of this state before July 1, 1981, must remain at the rate per annum which was legally prescribed at the time the judgments were entered, and such interest may not be compounded in any manner or form.

32-03-21. Damages for wrongful occupation of realty.

The detriment caused by the wrongful occupation of real property in cases not embraced in sections 32-03-22, 32-03-27, 32-03-28, and 32-03-29 is deemed to be the value of the use of the property for the time of such occupation, not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages and the costs, if any, of recovering the possession.

41-03-36. (3-310) Effect of instrument on obligation for which taken.

1. Unless otherwise agreed, if a certified check, cashier's check, or teller's check is taken for an

obligation, the obligation is discharged to the same extent discharge would result if an amount of money equal to the amount of the instrument were taken in payment of the obligation. Discharge of the obligation does not affect any liability that the obligor may have as an endorser of the instrument.

2. Unless otherwise agreed and except as provided in subsection 1, if a note or an uncertified check is taken for an obligation, the obligation is suspended to the same extent the obligation would be discharged if an amount of money equal to the amount of the instrument were taken.

   a. In the case of an uncertified check, suspension of the obligation continues until dishonor of the check or until it is paid or certified. Payment or certification of the check results in discharge of the obligation to the extent of the amount of the check.

   b. In the case of a note, suspension of the obligation continues until dishonor of the note or until it is paid. Payment of the note results in discharge of the obligation to the extent of the payment.

   c. Except as provided in subdivision d, if the check or note is dishonored and the obligee of the obligation for which the instrument was taken is the person entitled to enforce the instrument, the obligee may enforce either the instrument or the obligation. In the case of an instrument of a third person which is negotiated to the obligee by the obligor, discharge of the obligor on the instrument also discharges the obligation.

d. If the person entitled to enforce the instrument taken for an obligation is a person other than the obligee, the obligee may not enforce the obligation to the extent the obligation is suspended. If the obligee is the person entitled to enforce the instrument but no longer has possession of it because it was lost, stolen, or destroyed, the obligation may not be enforced to the extent of the amount payable on the instrument, and to that extent the obligee's rights against the obligor are limited to enforcement of the instrument.

3. If an instrument other than one described in subsection 1 or 2 is taken for an obligation, the effect is that stated in subsection 1 if the instrument is one on which a bank is liable as maker or acceptor or that stated in subsection 2 in any other case.

47-14-05. Legal rate of interest – Interest after maturity.

Interest for any legal indebtedness must be at the rate of six percent per annum unless a different rate not to exceed the rate specified in section 47-14-09 is contracted for in writing. All contracts must bear the same rate of interest after maturity as they bear before maturity, and any contract attempting to make the rate of interest higher after maturity is void as to the increase of interest, except for a charge for late payment penalty charged in addition to interest which may not exceed fifteen dollars or fifteen percent of the late payment, whichever

is less, unless otherwise agreed to in any commercial, agricultural, or real estate note or mortgage.

North Dakota Rules of Civil Procedure:

RULE 6. TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run may not be included. The last day of the period so computed must be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays must be excluded in the computation. Service by facsimile transmission must be completed by 5:00 p.m., receiver's time, on a weekday, which is not a legal holiday, or service is considered made on the following weekday which is not a legal holiday

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if a request for enlargement is made before expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under **Rules 4(e) (7), 52(b), 59(c), (i) and (j),** and **60(b)**, except to the extent and under the conditions stated in them.

(c) Unaffected by Expiration of Term. The period of time provided for the doing of any act or the taking of any

proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which is pending.

(d) For Motions – Affidavits. A written motion, other than one which may be heard ex parte, and notice of the motion must be served at least 18 days before the motion may be heard, unless a different period is fixed by rule or court order. A party may apply ex parte for the court to hear a motion sooner than 18 days after service of the motion.

(e) Additional Time After Service by Mail or Commercial Carrier. Whenever a party has the right or is required to do an act within a prescribed period after service of a notice or other paper and the notice or paper is served by mail or third-party commercial carrier, 3 days must be added to the prescribed period. Service by facsimile transmission is not service by mail or third-party commercial carrier for purposes of this rule.

RULE 11. SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, must be signed by the party. Each paper must contain the signer's address and telephone number, if any. If the person signing the paper is an attorney, the paper must also contain the attorney's

State Board of Law Examiners identification number. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper must be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, –

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or are reasonably based on a lack of information or belief.

(c) Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions

stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.

(1) How Initiated.

(A) By Motion. A motion for sanctions under this rule must be made separately from other motions or requests and must describe the specific conduct alleged to violate subdivision (b). The motion, brief, and any other supporting papers, must be served as provided in Rule 5, but must not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. The respondent shall have 10 days after a motion for sanctions is filed to serve and file an answer brief and other supporting papers. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(B) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision (b) and directing an attorney, law firm, or party

to show cause why it has not violated subdivision (b) with respect thereto.

(2) Nature of Sanction; Limitations. A sanction imposed for violation of this rule must be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(A) Monetary sanctions may not be awarded against a represented party for a violation of subdivision (b)(2).

(B) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed.

(d) Inapplicability to Discovery. Subdivisions (a) through (c) of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37.

RULE 52. FINDINGS BY THE COURT

(a) Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; and in granting or refusing temporary injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under ***Rules 12*** or ***56*** or any other motion except as provided in subdivision (c) of this rule.

(b) Amendment. On motion served and filed no later than 15 days after notice of entry of judgment, the court may amend its findings – or make additional findings – and may amend the judgment. The motion may accompany a motion for a new trial under ***Rule 59***. When findings of fact are made in actions tried without a jury, the sufficiency of the evidence supporting the findings may be later questioned whether or not the party raising the question in the district court objected to the findings, moved to amend them, or moved for partial findings.

(c) Judgment on partial findings. If during a trial without a jury a party has been fully heard on an issue and the court finds against the party on that issue, the court may enter judgment as a matter of law against that party with respect to a claim, or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue, or the court may decline to render any judgment until the close of all the evidence. Such a judgment shall be supported by findings of fact and conclusions of law as required by subdivision (a) of this rule.

RULE 54. JUDGMENT - COSTS

(a) Definition - Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment may not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

(b) Judgment Upon Multiple Claims or Involving Multiple Parties. If more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or if multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of that determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties does not terminate the action as to any of the

claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

(c) Demand for Judgment. A judgment by default may not be different in kind from or exceed the amount prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment must grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded that relief in the pleadings.

(d) Death Before Judgment. If a party dies after a verdict or decision upon any issue of fact and before judgment, the court nevertheless may render judgment thereon. That judgment is not a lien on the real property of the deceased party, but is payable as provided in Chapter 30.1 19, N.D.C.C.

(e) Costs; Attorneys' Fees.

(1) Costs Other than Attorneys' Fees. Costs and disbursements must be allowed as provided by statute. A party awarded costs and disbursements shall submit to the clerk a detailed, verified statement thereof. Upon receipt of the statement, the clerk shall allow those costs and disbursements and insert them in the judgment. A copy of the statement must accompany the notice of entry of judgment. Objections must be served and filed with the clerk, either within 7 days after notice of entry of judgment or within such longer time the court may fix by order made within the 7 days. Objections must specify the ground thereof. If objections are filed, the clerk

shall promptly submit them to the judge who ordered the judgment. The court by ex parte order shall fix a time for hearing the objections. Unless otherwise directed by the court, the parties may waive the right to hearing and submit written argument in lieu thereof within a time specified by the court.

(2) Attorneys' Fees. A claim for attorneys' fees and related nontaxable expenses not determined by the judgment must be made by motion. The motion must be served and filed not later than 15 days after notice of entry of judgment. The trial court may decide the motion even after an appeal is filed.

RULE 59. NEW TRIALS – AMENDMENT OF JUDGMENTS

(a) New Trial – Defined. A new trial is a re-examination of an issue of fact in the same court, after a trial and decision by a jury or court or by a referee.

(b) Causes for New Trial. The former verdict or other decision may be vacated and a new trial granted on the application of a party aggrieved for any of the following causes materially affecting the substantial rights of the party:

1. Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial;

2. Misconduct of the jury, and whenever any juror has been induced to assent to any general or special verdict or to a finding on any question

submitted to the jurors by the court by a resort to the determination of chance, the misconduct may be proved by the affidavit of any one of the jurors;

3. Accident or surprise which ordinary prudence could not have guarded against;

4. Newly discovered evidence material to the party making the application, which he could not with reasonable diligence have discovered and produced at the trial;

5. Excessive damages appearing to have been given under the influence of passion or prejudice, but when a new trial is asked for on this ground and it appears that the passion and prejudice affected only the amount of damages allowed and did not influence the findings of the jury on other issues in the case, the trial court, on hearing the motion, and the supreme court, on appeal, may order a reduction of the verdict in lieu of a new trial or order that a new trial be had unless the party in whose favor the verdict was given remits the excess of damages;

6. Insufficiency of the evidence to justify the verdict or other decision, or that it is against law;

7. Errors in law occurring at the trial and, when required, excepted to by the party making the application; or

8. If without fault or negligence on the part of the party aggrieved, such party is unable to obtain or secure a correct and complete transcript of the testimony and instructions given and proceedings had at the trial.

(c) Time for Motion for New Trial. Any motion for a new trial must be served and filed no later than the following time after notice of entry of judgment:

1. Upon the ground of newly discovered evidence, within 6 months; and

2. Upon any other ground, within 60 days, unless the court, for good cause shown, extends the time.

(d) Upon What Motion for New Trial Made. A motion for a new trial May be made upon the files, exhibits, and minutes of the court. Pertinent facts not a part of the minutes may be shown by affidavit. Either party may procure a complete or partial transcript of the proceedings for use upon the hearing of the motion.

(e) [RESERVED FOR FUTURE USE].

(f) Memorandum of Decision on Motion for New Trial. With all orders granting or refusing a new trial, the judge shall file a written memorandum concisely stating the different grounds on which the ruling is based, and unless the insufficiency or unsatisfactory nature of the evidence is expressly stated in the memorandum as a reason for granting the new trial, it must be presumed, on appeal, that it was not on that ground.

(g) Verdict Vacated by Court. The verdict of a jury also may be vacated and a new trial granted by the court in which the action is pending on its own motion without the application of either of the parties, when there has been such plain disregard by the jury of the instructions of the court or of the evidence in the case as to satisfy the court that the verdict was rendered under a misapprehension of

the instructions or under the influence of passion or prejudice.

(h) Upon Trial to the Court. In granting a new trial in an action tried without a jury the court, without vacating the judgment if one has been entered, may limit the trial to one or more issues or to the taking of additional testimony on one or more issues and shall confirm or amend the findings of fact and conclusions of law or make new findings and conclusions. If a judgment has been entered, the court may vacate it and enter a new judgment or may amend it to conform to the findings of fact and conclusions of law finally made by the court.

(i) On Court's Initiative; Notice; Specifying Grounds. No later than 15 days after notice of entry of judgment, the court may order a new trial for any reason that would justify granting a new trial on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. When granting a new trial on its own initiative or for a reason not stated in a motion, the court shall specify the grounds in its order.

(j) Motion to Alter or Amend a Judgment. Any motion to alter or amend a judgment must be served and filed no later than 15 days after notice of entry of the judgment.

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the records and errors therein arising from oversights or omission may be corrected by

the court: (1) at any time on its own initiative; or (2) on the motion of any party. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the Supreme Court, and thereafter while the appeal is pending may be so corrected with leave of the supreme court.

(b) Mistakes – Inadvertence – Excusable Neglect – Newly Discovered Evidence – Fraud – Etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment or order in any action or proceeding for the following reasons: (i) mistake, inadvertence, surprise, or excusable neglect; (ii) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under ***Rule 59(b)***; (iii) fraud (whether denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (iv) the judgment is void; (v) the judgment has been satisfied, released, or discharged, or a previous judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (vi) any other reason justifying relief from the operation of the judgment. The motion must be made within a reasonable time, and for reasons (i), (ii), and (iii) not more than one year after notice that the judgment or order was entered in the action or proceeding if the opposing party appeared, but not more than one year after a judgment by default has been entered. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from any appellate court except while an appeal from the judgment is actually pending before that court. This rule does not limit the power of a court to

entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in ***Rule 4(e)(7)***, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment must be by motion as prescribed in these rules or by an independent action.

RULE 70. JUDGMENT FOR SPECIFIC ACTS - VESTING TITLE

If a judgment directs a party to execute a conveyance of land or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified, the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court and the act when so done has like effect as if done by the party. On application of the party entitled to performance, the clerk shall issue a writ of attachment or sequestration against the property of the disobedient party to compel obedience to the judgment. The court may also in proper cases adjudge the party in contempt. If real or personal property is within the state, the court in lieu of directing a conveyance thereof may enter a judgment divesting the title of any party and vesting it in others and such judgment has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in

whose favor it is entered is entitled to a writ of execution or assistance upon application to the clerk.

IN THE DISTRICT COURT OF CASS COUNTY,
NORTH DAKOTA

E.W. Wylie Corporation, a Minnesota Corporation, now called Matrix Properties Corporation,

Plaintiff,

vs.

TAG Investments, a North Dakota Partnership, James A. Grettum, individually, an Individual Resident of North Dakota,

Defendants.

Civil No.: CV-99-02045

DEFENDANTS' RESPONSE TO PLAINTIFF'S NOTICE OF MOTION AND MOTION FOR AN ORDER DECLARING THAT PLAINTIFF OWES NO 2000 OPTION MONEY

Defendants, TAG Investments and James A. Grettum, respond to Plaintiff's Notice of Motion and Motion for an Order Declaring that Plaintiff Owes No 2000 Option Money dated June 13, 2000.

Point 1. The Court Does Not Have Jurisdiction To Give Matrix Properties Corporation, a Minnesota Corporation, any Relief.

Attached Hereto and Incorporated by Reference Is a Copy of the Supreme Court of North Dakota's Decision Stemming from an Appeal in the above Judgment. The Supreme Court of North Dakota did not remand this case to the District Court of Cass County for any other purpose than setting a cost judgment for the appeal. The Supreme Court of North Dakota merely affirmed the Decision of this Court's judgment ordering Defendants to specifically perform under the Option Contract dated October 14,

1996. In other words, the Supreme Court ordered that this Court's judgment was in the nature of a declaratory judgment declaring that the subject option and purchase

* * *

Point 2. The Lower Court ruling is a final Judgment That Cannot be Amended Without Compliance with Rule 52, 59 or 60 of the North Dakota Rules of Civil Procedure.

Once the Supreme Court of North Dakota has affirmed a court's judgment, there is a final judgment with its finality relating to the date of the original entry. *Geier v. Tjaden*, 84 N.W.2d 582, 583 (N.D. 1957). The judgment entered, in this case, did not litigate all issues between the parties in reference to the subject contract. The litigation between the parties was limited to the effect of the June 1, 1999, date. To that issue, and that issue alone, the matter is final. No other issue in reference to this contract, or the closing, has been litigated to any court. This Court does not have jurisdiction to amend the final judgment, entered herein, unless the Plaintiff can fit within one of the grounds for amending the judgment set forth in the North Dakota Rules of Civil Procedure. As stated in *Cokins v. Frandsen*, 136 N.W.2d 377 (N.D. 1965) in paragraph 3:

> "3. Any order made subsequent to final judgment must be for the purpose of carrying out the provisions of the judgment. Insofar as any such order attempts to modify such judgment, unless made on grounds provided for in the North Dakota Rules of Civil Procedure for amending or correcting a judgment, and unless made within the time provided for such amendment or correction, it is void."

In the instant case, this court could not render judgment on matters that occur subsequent to November 2, 1999, and it did not attempt to do so. As of November 2, 1999, this court could not order TAG Investments to close because the facts were not present before it to establish that such an Order would be appropriate. Ordering TAG Investments to now close cannot to be done by motion. There is no Rule of Civil Procedure that would apply to Plaintiff's instant motion. **Because Matrix Properties Corporation did not seek a stay**, the time deadlines under Rule 52 of the North Dakota Rules of Civil Procedure have not been met in that more than fifteen days have passed since entry of the final judgment. Rule 59 similarly has a fifteen days' requirement for a request for a new trial or amendment to judgment, and such time has passed. Defendants' Motion does not set forth any of the grounds found in Rule 60 of the North Dakota Rules of Civil Procedure. Rule 60 would require the vacation of said Order after relief from such judgment. Since the judgment only relates to the effect of not closing prior to June 1, 1999, such use of Rule 60 would be inappropriate.

The instant case illustrates the effect of the absence of a remand for further proceedings by the Supreme Court of North Dakota in its judgment. As stated by *Waterhouse v. Iowa District Court for Linn County,* 593 N.W.2d 141 (Iowa 1999) at page 142:

> "In the absence of a remand or procedendo directing further proceedings in the trial court, the jurisdiction of the district court terminates both as to the parties and subject matter when a district court judgment has been affirmed. *Franzen v. Deere & Co.,* 409 N.W.2d 672, 674 (Iowa 1987). The district court retains jurisdiction during and after appeal from its final judgment to enforce

> the judgment itself, but the district court does not have the authority to revisit and decide differently issues already concluded by that judgment. *Id.*"

Franzen v. Deere And Company, 409 N.W.2d 672, 674 (Iowa 1987). The District Court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, but the District Court does not have authority to revisit issues already concluded by that judgment nor decide different issues that stem from subsequent actual matters. It is respectfully submitted that the District Court does not have jurisdiction, in this case, to expand upon the final judgment modify it or in any way, shape or form, without compliance with the North Dakota Rules of Civil Procedure. The contract issues after November 2, 1999, were truly not before this Court and should not be before this Court Plaintiff's instant motion. If Plaintiff feels aggrieved by the present factual scenario, a declaratory action determining the rights of the parties as it now exists, is the only remedy Plaintiff has.

Point 3. The North Dakota Rules of Civil Procedure have not been followed by the Plaintiff and this court has no authority to proceed in the instant motion.

A. Plaintiff has failed to afford Defendants with sufficient time to address this Motion. Pursuant to Rule 6(d) of the North Dakota Rules of Civil Procedure,

> "A written Motion, other than one which may be heard ex parte, and notice of the motion must be served at least 14 days before the motion may be heard, unless a different period is fixed by these

> rules or by order of the court. Such an order may for cause shown be made on ex parte application."

There is no order setting a different period of time, nor has there been an ex parte application. The answering Defendants have no knowledge of an ex parte application or ex parte order setting forth a different time for the required notice. There is nothing in the Rules that would allow Plaintiff to bring a motion requesting a shortened time for noticing the hearing and the hearing on the motion before the court at the same time. The failure to have an order shortening the time for notice means that the time limits of Rule 6(d) should apply. The length of the notice afforded Defendants is particularly egregious in light of the massive flooding occurring in Fargo, North Dakota, on June 20, 2000. As noted by the Affidavit of James A. Grettum, James A. Grettum's office and his attorneys' offices, as well as his attorneys' homes were flooded. Precious time to properly respond to Plaintiff's Motion has been lost. Shortened notice exasperates Defendants' situation.

Point 4. Plaintiff's instant Motion is an action seeking a declaratory judgment without compliance with the Rules.

Rule 57 of the North Dakota Rules of Civil Procedure, governing declaratory judgments, indicates that the procedures of Chapter 32 shall be in accordance with these rules and the right to trial by jury may be demanded under the circumstances of the matter provided in Rules 38 and 39. Under Chapter 32-23, the Rules would require a Summons and Complaint to have Plaintiffs obtain a declaratory judgment. Both a service of a Summons under

Rule 3, a Complaint setting forth in its title to relief under Rule 7 and the allowance of Defendants' right to answer under Rule 8 of North Dakota Rules of Civil Procedure would allow this discovery on the part of the Defendants under several Rules, and potentially a jury trial on factual issues. Plaintiff does not want to allow Defendants to have their due process rights. This Court has no authority to short circuit the process because of a judgment that may involve this contract but did not determine all rights relating to such contract. There may be a course of action open to Plaintiff if it feels aggrieved by the factual situation but a motion in the instant case is not the procedure that it can follow.

* * *

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF CASS	EAST CENTRAL JUDICIAL DISTRICT
Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation, Plaintiff, vs. TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota, Defendants.	Civil No. 99-02045 MOTION HEARING

TRANSCRIPT OF PROCEEDINGS

- BEFORE THE HONORABLE FRANK L. RACEK
– DISTRICT JUDGE –

Cass County Courthouse
Fargo, North Dakota 58103
June 22, 2000

APPEARANCES

FOR THE PLAINTIFF:
Mr. Sidney J. Spaeth
Attorney at Law
502 First Avenue North
Fargo, North Dakota 58107-1389

FOR THE DEFENDANT:
Mr. Jonathan T. Garaas
Attorney at Law
1314 23rd Avenue South
Fargo, North Dakota 58103

* * *

[3] THE COURT: So now what's in dispute here? There's supposed to be a payment made in the year 2,000?

MR. GARAAS: No, there's another option – the effect of it was, Your Honor, that the Supreme Court has said that the 20 acres that was purchased on June 28, 1999, met the June 1, 1999, deadline. They gave a notice of exercise on July 1, 1999, that they have never carried through with until December when they made a counter-proposal, and the most recent Supreme Court decision would in fact stand for a very substantial recognition that this option to purchase – notice that [4] they are relying upon of July 1, 1999, has been rejected by noncompliance and also by deviation from the terms of the option to purchase. We have no – no obligation to proceed because they've never acted to proceed and that's true since July 1.

On July 1, 1999, there was a 45-day closing requirement imposed upon them that they didn't even come close to meeting. That would have been to August 16th by my count if I gave them credit for the Sunday which was the 15th which would be the 45 days. On November 2, 1999, the District Court, contrary to the Plaintiff's position, said that we have to honor the terms of the option to purchase, and we have always honored the option to purchase terms. The Plaintiff has repudiated them, gave a counterproposal and never closed. In fact, on June 28th Mr. Bueide, their attorney, told us that when he threatened us with a

hellacious lawsuit he hadn't even read the option to purchase prior to threatening us with a lawsuit.

On the 45 days that was supposed to accomplish the closing the burden was upon them not us because we don't have to give them good title. They have to pay us. There are a number of things that are open to them depending on what they find, and when they find it they have to give us an option or give us some – identify [5] what their next step is so that we then have some certain things that we can do including saying, Take a hike, buddy, because we're not gonna do anything. You ought to pay us if you want what amounts to is a – is a deed for whatever interest in the property we have and we may not have anything. Because at the time of the option to purchase we didn't have any interest in the property. We only had the possibility of acquiring an interest in the property and they knew that. And if we didn't have title they could take a hike. They could walk away. Their attorney at the Supreme Court arguments recognized they could walk away.

Your Honor, what the Court is being asked to do on nine days notice – and that's contrary to the North Dakota Rules of Evidence. I'm not aware of any order that's shortening up. You can see how devastating we are – or we have been from a professional and a personal standpoint, and then be hit with nine days notice for something which is seeking to amend a final judgment which they never appealed from at a time when they're in default. This blows my mind. I do not understand the Plaintiff. How they think that when they're in default that they have any contractual rights. Because if they do they're operating under a different series of law than I am. I'm operating and my client has always been [6] operating on the basis of an option to purchase which we promised to honor, and

they have misrepresented it and told this Court an absolute falsehood. You saw the transcript of what I said. I never said that we would transfer the property if the Supreme Court ruled against us. I have always said that we will honor the option to purchase.

My clients honor their word, but they will not accept one single counterproposal and that's what the Plaintiff is trying to do is give counterproposals and shove them down our throats. And we will not accept any deviation from the terms of the option to purchase and we will not accept any deviation from due process of law which says 14 days notice for a motion. And I can't conceive of a motion that can arise out of a final judgment that they didn't appeal from. I can't conceive of due process of law under the Rules of Civil Procedure that provide for 20 days notice for proceedings which are dependent upon new facts that were never even in existence at the time of the Judge's memorandum opinion much less on November 2nd when he – when the final order and judgment came down.

And for this Court to now being asked to intercept, give an advisory opinion when it doesn't have jurisdiction in the first place blows my legal mind. And [7] I just can't understand how they can expect this Court to have the right to act much less an understanding that was going on. If they think that they have a lawsuit, they should bring it. If they think that they have an option to purchase that is capable of being exercised, they better honor it.

But the facts are on June 2nd, the year 2,000, they had not accomplished the purchase and thats past tense because the contract now provides for past tense purchased later on deeded on June 1, 19 – of the year 2,000. In fact, they hadn't even tried to – to act prior to that time

except through what amounts to is contacts through attorneys which aren't included in the option to purchase in any way, shape or form. And the order is for us to appear at closing which they then unilaterally ordered to close and then unilateral cancellations on two different occasions in May and – and June. The exact dates, excuse me, escape me, Your Honor, and that's partly because I haven't had actually time to prepare for this. I came right off the tractor. I've been fighting sewage.

THE COURT: Okay. Mr. Spaeth.

* * *

IN THE DISTRICT COURT FOR CASS COUNTY, NORTH DAKOTA

Matrix Properties Corporation, formerly known as E.W. Wylie Corporation, a Minnesota Corporation, Plaintiff, vs. TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota, Defendants.	CIVIL NO.:CV-99-02045 **BRIEF IN RESISTANCE TO PLAINTIFF'S MOTION FOR ORDER COMPELLING DEFENDANTS TO PROVIDE DEEDS TO PLAINTIFF, OR, ALTERNATIVELY, DECLARING THE JUDICIAL TRANSFER OF THE PROPERTY TO PLAINTIFF**

For their response to Plaintiff's Motion, Defendants submit the following:

INTRODUCTION

Matrix Properties Corporation's introduction failed to accurately state the record and the facts. On Page 1, Matrix Properties Corporation states:

> "This Court, as affirmed by the North Dakota Supreme Court, has ordered the specific performance of the sale of real property in Cass County North Dakota pursuant to the terms of a 1996 Option Agreement between plaintiff and defendants TAG Investments and James A. Grettum, and certain other parties affiliated with TAG and Grettum (the "Agreement").

First, this Court has **never** issued an order requiring *the specific performance of the sale of real property*. This Court has ordered the Defendants [no "other parties affiliated with TAG and Grettum" were ordered, nor were they involved in said litigation] as follows:

* * *

POINT 2. THE LOWER COURT DID NOT HAVE JURISDICTION TO GIVE MATRIX PROPERTIES CORPORATION, A MINNESOTA CORPORATION, ANY RELIEF.

The Supreme Court of North Dakota, in *Matrix Properties Corporation v. TAG Investments*, 2000 ND 88, 609 NW 2d 737, did not remand this case to the District Court of Cass County for any purpose other than setting a cost judgment for the appeal. The Supreme Court of North Dakota merely affirmed the Cass County District Court's decision[1] resulting in a November 2, 1999, Judgment[2] ordering Defendants ". . . to specifically perform under the Option To Purchase dated October 14, 1996." In other words, the prior proceedings before the Supreme Court of North Dakota, and earlier before the lower court, were in the nature of a declaratory judgment declaring that the subject Option to Purchase was not terminated by its own terms because of the failure of Matrix Properties Corporation to close on twenty acres on or before June 1, 1999.

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[1] **Addendum #1.**

[2] **Addendum #2.**

The relief given to Matrix Properties Corporation, by the former judgment, and subsequent appeal, was a declaratory judgment consistent with North Dakota Century Code §32-04-02, paragraph 3. The Judgment of November 2, 1999, did not contain an order compelling Defendants to close because the facts before the trial court at the time of the summary judgment (as illustrated by the recitation of facts in the Supreme Court's Decision and the District Court's Memorandum Opinion) did not establish Matrix Properties Corporation's right to have a closing compelled by the lower court as of the date of the Judgment. Indeed, when Matrix Properties Corporation first submitted its proposed Judgment to the District Court, it sought an order which would have compelled a ". . . closing on the sale of the Property subject to Plaintiff's option exercises dated July 1, 1999 and July 2, 1999" involving a deed from TAG Investments.[3] Matrix Properties Corporation's initial proposed judgment was rejected by the District Court[4] because the first proposed Judgment exceeded the lower court's order for judgment – the factual circumstances as of November 2, 1999, would not support that form of judgment.

TAG Investments appealed the November 2, 1999, Judgment of the District Court, **BUT DID NOT SEEK A STAY**. More importantly, **MATRIX PROPERTIES CORPORATION DID NOT SEEK A STAY** from the effect of said November 2, 1999, Judgment.

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[3] Addendum #3 [the Memorandum Opinion referenced in the letter is set forth as Addendum #1, and is not herein duplicated].

[4] Addendum #4.

As will be more fully discussed in Point 3 of this Brief, a lower court's jurisdiction terminates as to both subject matter and parties upon an affirmance, without remand, of a judgment by an appellate court. See *Waterhouse v. Iowa District Court for Linn County,* 593 N.W.2d 141, 142 (Iowa 1999).

POINT 3. THE JUDGMENT OF NOVEMBER 2, 1999, IS A FINAL JUDGMENT THAT CANNOT BE AMENDED WITHOUT COMPLIANCE WITH RULE 52, 59 AND/OR 60 OF THE NORTH DAKOTA RULES OF CIVIL PROCEDURE.

Once the Supreme Court of North Dakota has affirmed a lower court's judgment, there is a final judgment – with its finality relating to the date of the original entry. *Geier v. Tjaden*, 84 N.W.2d 582, 583 (N.D. 1957). The judgment entered, in this case, did not litigate all issues between the parties in reference to the subject contract [Option to Purchase]. The litigation between the parties was limited to the effect of certain actions taken as of the June 1, 1999, date established by the Option to Purchase. To that issue, and that issue alone, the matter is final. No other issue in reference to this contract, or the closing, has been litigated to any court.[5]

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[5] However, this court has determined, *and Matrix Properties Corporation did not appeal from such decision*, that the Option to Purchase requires "... the closing (the time at which the money is exchanged for the deed) must occur within 45 days following exercise of the option (and up to 125 days if a title problem[ ] needs to be resolved)." Addendum #1, page 12. The lower court later notes the timetable for closing, "... the terms of the Option to Purchase which allowed 45 days to close the deal from the date of the exercise of the

(Continued on following page)

This District Court does not have jurisdiction to amend the final judgment of November 2, 1999, unless there is a ground for amending the judgment found within the North Dakota Rules of Civil Procedure. As stated in *Cokins v. Frandsen*, 136 N.W.2d 377 (N.D. 1965) in paragraph 3:

> "3. Any order made subsequent to final judgment must be for the purpose of carrying out the provisions of the judgment. Insofar as any such order attempts to modify such judgment, unless made on grounds provided for in the North Dakota Rules of Civil Procedure for

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option." Addendum #1, pages 12-13. The lower court then nails the conclusive effect of a provision within the Option to Purchase:

> "It can not be disputed in this case that time is of the essence, as the Option to Purchase specifically provides that it is. Paragraph 21 of the Option to Purchase provides:
>
> 21. **TIME OF THE ESSENCE:** The parties expressly agree that time shall be of the essence in the performance of the parties under this agreement."

This court reiterated its position, *never appealed from by Matrix Properties Corporation*, (a) "(i)n this case the option agreement sets forth a clear timeline of the contemplated performance." [page 13]; (b) "It appears to the Court that these were the matters for which time was of the essence . . ." [page 14]; (c) "The Option to Purchase clearly states that closing could occur at any time up to 45 days after the exercise of the option . . ." [page 14]; (d) "The optioners made an offer wherein they agreed that the optionees would have forty-five days from the date of exercise of the option to close the transaction." [page 14]; (e) "Having exercised the option, they (E.W. Wylie) were required to close the purchase within 45 days. They closed within 34 days, well within the time allowed for performance" [page 16]; (f) "The executory contract included a term that the transaction must close within 45 days." [page 16]. Pages reference Addendum #1, and the quoted language is not intended to identify all of this court's references to the 45 day closing requirement.

> amending or correcting a judgment, and unless made within the time provided for such amendment or correction, it is void."

In the instant case, the lower court **could not** render judgment on matters that occur *subsequent* to November 2, 1999 [to do so involves a legal and factual impossibility]. As of November 2, 1999, the lower court could not order TAG Investments to close because the facts were not present before it to establish that such an Order would be appropriate.

Ordering TAG Investments to now close cannot be done by motion. Similarly, determining [as the Order of June 26, 1999, so determines], that there is a binding executory contract between the parties because of disputed facts that occurred *subsequent* to the November 2, 1999, Judgment is beyond the lower court's jurisdiction.

There is no North Dakota Rule of Civil Procedure that would apply to Matrix Properties Corporation's subject motion, nor has Plaintiff made any attempt to identify its legal basis for such an order. There is no rule of procedure that would allow the District Court to issue declaratory orders affecting substantive rights on contractual matters that are based on facts that occur subsequent to the date of the judgment.

Because Matrix Properties Corporation did not seek a stay, the time deadlines under Rule 52 of the North Dakota Rules of Civil Procedure have not been met in that more than fifteen days have passed since entry of the final judgment. Rule 59 of the North Dakota Rules of Civil Procedure has a similar fifteen days' requirement for a request for a new trial or amendment to judgment, and such time period has passed.

Matrix Properties Corporation's Motion does not set forth any of the grounds found within Rule 60 of the North Dakota Rules of Civil Procedure. Rule 60 N.D.R.Civ.P. would require the vacation of the judgment or relief from the judgment. Since the Judgment, upon affirmance by the Supreme Court of North Dakota, only relates to the effect of not closing prior to June 1, 1999, Rule 60 N.D.R.Civ.P. cannot be the basis for Matrix Properties Corporation's notion.

The instant case illustrates the effect of the absence of a remand for further proceedings by the Supreme Court of North Dakota. As stated by *Waterhouse v. Iowa District Court for Linn County,* 593 N.W.2d 141 (Iowa 1999), at page 142:

> "In the absence of a remand or procedendo directing further proceedings in the trial court, the jurisdiction of the district court terminates both as to the parties and subject matter when a district court judgment has been affirmed. *Franzen v. Deere & Co.,* 409 N.W.2d 672, 674 (Iowa 1987). The district court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, but the district court does not have the authority to revisit and decide differently issues already concluded by that judgment. *Id.*"

In *Franzen v. Deere And Company*, 409 N.W.2d 672, 674 (Iowa 1987), it is noted that ". . . the district court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, (but) the district court does not have authority to revisit and decide differently issues already concluded by that judgment." It is respectfully submitted that the Cass County District

Court does not have jurisdiction to expand upon the final judgment or modify it or in any way, shape or form, without compliance with the North Dakota Rules of Civil Procedure. The contract issues arising out of the Option to Purchase occurring after November 2, 1999, are truly not part of the prior litigation, and should not be passed upon by the lower court by means of a post-judgment motion.

If Matrix Properties Corporation feels aggrieved by the present factual scenario, a declaratory action determining the rights of the parties, as they now exist, is the appropriate remedy – not a post-judgment motion that is not authorized by the North Dakota Rules of Civil Procedure that acts as an amendment to a final judgment.

POINT 4. MATRIX PROPERTIES CORPORATION'S MOTION IS AN ACTION SEEKING A DECLARATORY JUDGMENT WITHOUT COMPLIANCE WITH APPROPRIATE RULES OR STATUTES.

Rule 57 of the North Dakota Rules of Civil Procedure, governing declaratory judgments, indicates that the procedures of Chapter 32-23 of the North Dakota Century Code shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances of the matter provided in Rules 38 and 39. Under Chapter 32-23 of the North Dakota Century Code and the civil procedure rules, a Summons and Complaint is required before a lower court may provide declaratory judgment. A service of a Summons under Rule 3 N.D.R.Civ.P., a Complaint showing entitlement to relief under Rule 7 N.D.R.Civ.P., the allowance of the defendants' right to answer under Rule 8 N.D.R.Civ.P., discovery on the part of the defendants under several different rules of procedure,

and the potential right to a jury trial on factual issues are all necessary matters inherent in the judicial system heretofore created to provide Defendants with due process of law. The lower court's Order of June 26, 2000, was issued without compliance with the due rights of the Defendants as expressed in the North Dakota Rules of Civil Procedure.

The District Court does not have the authority to short-circuit the process. While the former judgment may involve the same option contract [Option to Purchase], it did not determine all rights relating to said Option to Purchase. There may be a course of action open to Matrix Properties Corporation if it feels aggrieved by the factual situation presented after November 2, 1999 [or even after it started its original Complaint for Specific Performance on July 9, 1999], but its motion prompting these proceedings, and the resulting declaratory Order were totally without statutory or procedural basis, and contrary to the due process rights of Defendants – as well as those individuals or entities that are not presently even parties to the litigation.

* * *

IN THE DISTRICT COURT OF CASS COUNTY,
NORTH DAKOTA

Matrix Properties Corporation, formerly known as E. W. Wylie Corporation, a Minnesota Corporation,

Plaintiff,

vs.

TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota,

Defendants.

CIVIL NO.: CV-99-02045

BRIEF OF DEFENDANTS IN RESISTANCE TO PLAINTIFF'S MOTION FOR AN ORDER COMPELLING DEFENDANTS TO PROVIDE DEEDS TO PLAINTIFF, OR, ALTERNATIVELY, DECLARING THE JUDICIAL TRANSFER OF THE PROPERTY TO PLAINTIFF

For their response to Plaintiff's Motion, Defendants submit the following:

INTRODUCTION

Matrix Properties Corporation brings a Motion to amend a Judgment on for hearing while the case is on appeal. Matrix Properties Corporation does not seek to enforce the Judgment, which Judgment requires Defendants to specifically perform under the Option to Purchase. Rather, Matrix Properties Corporation requests this Court amend the Judgment. Such request to amend while the case is on appeal, is made without any reliance upon any civil rule and without any factual presentation made by Matrix Properties Corporation. It is also made upon too little notice pursuant to the Rules of Civil Procedure.

* * *

LAW AND ARGUMENT

I. Judicial and Procedural Issues

POINT 1. THE COURTS DOES NOT HAVE JURISDICTION TO DO WHAT E.W. WYLIE CORPORATION, A MINNESOTA CORPORATION, DEMANDS.

There has been an appeal filed and upon the filing of the notice of appeal the trial court is stripped of jurisdiction to amend or interpret the Judgment. *Buzzell v. Libi*, 340 N.W.2d 36 (N.D. 1983); *Schmidt v. Schmidt*, 325 N.W.2d 230 (N.D. 1982); *Harwood v. Harwood,* 283 N.W.2d 144 (N.D. 1979); *Orwick v. Orwick*, 152 N.W.2d 95 (N.D. 1967); *Bryan v. Miller*, 16 N.W.2d 275, 73 N.D. 487 (N.D. 1944).

The Court's Judgment required only the Defendants to " . . . specifically perform under the Option to Purchase dated October 14, 1996." The Court's Order and resulting Judgment did not direct a deed nor a conveyance. Thus the Judgment of the Court is in the nature of a declaratory action stating that the Option to Purchase dated October 14, 1996 was not terminated by its own terms because of the non-purchase by the Plaintiff of 20 acres on or before June 1, 1999. Nothing within the Judgment required a deed to Matrix Properties Corporation, a Minnesota Corporation. The facts and circumstances set forth at the time the Judgment was entered did not require a deed. Whether facts and circumstances *subsequent* to the November 2, 1999, Judgment would result in a deed to Matrix Properties Corporation are matters that cannot be ruled upon by this Court while it is on appeal [among other reasons].

POINT 2. THE LOWER COURT DID NOT HAVE JURISDICTION TO GIVE MATRIX PROPERTIES CORPORATION, A MINNESOTA CORPORATION, ANY RELIEF.

The Supreme Court of North Dakota, in *Matrix Properties Corporation v. TAG Investments*, 2000 ND 88, 609 NW 2d 737, did not remand this case to the District Court of Cass County for any purpose other than setting a cost judgment for the appeal. The Supreme Court of North Dakota merely affirmed the Cass County District Court's decision[7] resulting in a November 2, 1999, Judgment[8] ordering Defendants " . . . to specifically perform under the Option To Purchase dated October 14, 1996." In other words, the prior proceedings before the Supreme Court of North Dakota, and earlier before the lower court, were in the nature of a declaratory judgment declaring that the subject Option to Purchase was not terminated by its own terms because of the failure of Matrix Properties Corporation to close on twenty acres on or before June 1, 1999.

The relief given to Matrix Properties Corporation, by the former judgment, and subsequent appeal, was a declaratory judgment consistent with North Dakota Century Code §32-04-02, paragraph 3. The Judgment of November 2, 1999, did not contain an order compelling Defendants to close because the facts before the trial court at the time of the summary judgment (as illustrated by the recitation of facts in the Supreme Court's Decision and the District Court's Memorandum Opinion) did not establish

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[7] Addendum #1.

[8] Addendum #2.

Matrix Properties Corporation's right to have a closing compelled by the lower court as of the date of the Judgment. Indeed, when Matrix Properties Corporation first submitted its proposed Judgment to the District Court it sought an order which would have compelled a " . . . closing on the sale of the Property subject to Plaintiff's option exercises dated July 1, 1999 and July 2, 1999" involving a deed from TAG Investments.[9] Matrix Properties Corporation's initial proposed judgment was rejected by the District Court[10] because the first proposed Judgment exceeded the lower court's order for judgment – the factual circumstances as of November 2, 1999, would not support that form of judgment.

TAG Investments appealed the November 2, 1999, Judgment of the District Court, **BUT DID NOT SEEK A STAY.** More importantly, **MATRIX PROPERTIES CORPORATION DID NOT SEEK A STAY** from the effect of said November 2, 1999, Judgment.

As will be more fully discussed in Point 3 of this Brief, a lower court's jurisdiction terminates as to both subject matter and parties upon an affirmance, without remand, of a judgment by an appellate court. See *Waterhouse v. Iowa District Court for Linn County,* 593 N.W.2d 141, 142 (Iowa 1999).

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[9] Addendum #3 [the Memorandum Opinion referenced in the letter is set forth as Addendum #1, and is not herein duplicated].

[10] Addendum #4.

POINT 3. THE JUDGMENT OF NOVEMBER 2, 1999, IS A FINAL JUDGMENT THAT CANNOT BE AMENDED WITHOUT COMPLIANCE WITH RULE 52, 59 AND/OR 60 OF THE NORTH DAKOTA RULES OF CIVIL PROCEDURE.

Once the Supreme Court of North Dakota has affirmed a lower court's judgment, there is a final judgment – with its finality relating to the date of the original entry. *Geier v. Tjaden*, 84 N.W.2d 582, 583 (N.D. 1957). The judgment entered, in this case, did not litigate all issues between the parties in reference to the subject contract [Option to Purchase]. The litigation between the parties was limited to the effect of certain actions taken as of the June 1, 1999, date established by the Options to Purchase. To that issue, and that issue alone, the matter is final. No other issue in reference to this contract, or the closing, has been litigated to any court.[11]

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[11] However, this court has determined, *and Matrix Properties Corporation did not appeal from such decision*, that the Option to Purchase requires " . . . the closing (the time at which the money is exchanged for the deed) must occur within 45 days following exercise of the option (and up to 125 days if a title problem[ ] needs to be resolved)." Addendum #1, page 12. The lower court later notes the timetable for closing, " . . . the terms of the Option to Purchase which allowed 45 days to close the deal from the date of the exercise of the option." Addendum #1, pages 12-13. The lower court then nails the conclusive effect of a provision within the Option to Purchase:

> "It can not be disputed in this case that time is of the essence, as the Option to Purchase specifically provides that it is. Paragraph 21 of the Option to Purchase provides:
>
> > 21. TIME OF THE ESSENCE: The parties expressly agree that time shall be of the essence in the performance of the parties under this agreement."

(Continued on following page)

This District Court does not have jurisdiction to amend the final judgment of November 2, 1999, unless there is a ground for amending the judgment found within the North Dakota Rules of Civil Procedure. As stated in *Cokins v. Frandsen*, 136 N.W.2d 377 (N.D. 1965) in paragraph 3:

> "3. Any order made subsequent to final judgment must be for the purpose of carrying out the provisions of the judgment. Insofar as any such order attempts to modify such judgment, unless made on grounds provided for in the North Dakota Rules of Civil Procedure for amending or correcting a judgment, and unless made within the time provided for such amendment or correction, it is void."

In the instant case, the lower court **could not** render judgment on matters that occur *subsequent* to November 2, 1999 [to do so involves a legal and factual impossibility].

This court reiterated its position, *never appealed from by Matrix Properties Corporation*, (a) "(i)n this case the option agreement sets forth a clear timeline of the contemplated performance." [page 13]; (b) "It appears to the Court that these were the matters for which time was of the essence . . . " [page 14]; (c) "The Option to Purchase clearly states that closing could occur at any time up to 45 days after the exercise of the option . . . " [page 14]; (d) "The optioners made an offer wherein they agreed that the optionees would have forty-five days from the date of exercise of the option to close the transaction." [page 14]; (e) "Having exercised the option, they (E.W. Wylie) were required to close the purchase within 45 days. They closed within 34 days, well within the time allowed for performance" [page 16]; (f) "The executory contract included a term that the transaction must close within 45 days." [page 16]. Pages reference Addendum #1, and the quoted language is not intended to identify all of this court's references to the 45 day closing requirement.

As of November 2, 1999, the lower court could not order TAG Investments to close because the facts were not present before it to establish that such an Order would be appropriate.

Ordering TAG Investments to now close cannot be done by motion. Similarly, determining [as the Order of June 26, 1999, so determines], that there is a binding executory contract between the parties because of disputed facts that occurred *subsequent* to the November 2, 1999, Judgment is beyond the lower court's jurisdiction.

There is no North Dakota Rule of Civil Procedure that would apply to Matrix Properties Corporation's subject motion, nor has Plaintiff made any attempt to identify its legal basis for such an order. There is no rule of procedure that would allow the District Court to issue declaratory orders affecting substantive rights on contractual matters that are based on facts that occur subsequent to the date of the judgment.

Because Matrix Properties Corporation did not seek a stay, the time deadlines under Rule 52 of the North Dakota Rules of Civil Procedure have not been met in that more than fifteen days have passed since entry of the final judgment. Rule 59 of the North Dakota Rules of Civil Procedure has a similar fifteen days' retirement for a request for a new trial or amendment to judgment, and such time period has passed.

Matrix Properties Corporation's Motion does not set forth any of the grounds found within Rule 60 of the North Dakota Rules of Civil Procedure. Rule 60 N.D.R.Civ.P. would require the vacation of the judgment or relief from the judgment. Since the Judgment, upon affirmance by the Supreme Court of North Dakota, only relates to the effect

of not closing prior to June 1, 1999, Rule 60 N.D.R.Civ.P. cannot be the basis for Matrix Properties Corporation's notion [sic].

The instant case illustrates the effect of the absence of a remand for further proceedings by the Supreme Court of North Dakota. As stated by *Waterhouse v. Iowa District Court for Linn County*, 593 N.W.2d 141 (Iowa 1999), at page 142:

> "In the absence of a remand or procedendo directing further proceedings in the trial court, the jurisdiction of the district court terminates both as to the parties and subject matter when a district court judgment has been affirmed. *Franzen v. Deere & Co.*, 409 N.W.2d 672, 674 (Iowa 1987). The district court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, but the district court does not have the authority to revisit and decide differently issues already concluded by that judgment. *Id.*"

In *Franzen v. Deere And Company*, 409 N.W.2d 672, 674 (Iowa 1987), it is noted that " . . . the district court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, (but) the district court does not have authority to revisit and decide differently issues already concluded by that judgment." It is respectfully submitted that the Cass County District Court does not have jurisdiction to expand upon the final judgment or modify it or in any way, shape or form, without compliance with the North Dakota Rules of Civil Procedure. The contract issues arising out of the Option to Purchase occurring after November 2, 1999, are truly not

part of the prior litigation, and should not be passed upon by the lower court by means of a post-judgment motion.

If Matrix Properties Corporation feels aggrieved by the present factual scenario, a declaratory action determining the rights of the parties, as they now exist, is the appropriate remedy – not a post-judgment motion that is not authorized by the North Dakota Rules of Civil Procedure that acts as an amendment to a final judgment.

POINT 4. MATRIX PROPERTIES CORPORATION'S MOTION IS AN ACTION SEEKING A DECLARATORY JUDGMENT WITHOUT COMPLIANCE WITH APPROPRIATE RULES OR STATUTES.

Rule 57 of the North Dakota Rules of Civil Procedure, governing declaratory judgments, indicates that the procedures of Chapter 32-23 of the North Dakota Century Code shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances of the matter provided in Rules 38 and 39. Under Chapter 32-23 of the North Dakota Century Code and the civil procedure rules, a Summons and Complaint is required before a lower court may provide declaratory judgment. A service of a Summons under Rule 3 N.D.R.Civ.P., a Complaint showing entitlement to relief under Rule 7 N.D.R.Civ.P., the allowance of the defendants' right to answer under Rule 8 N.D.R.Civ.P., discovery on the part of the defendants under several different rules of procedure, and the potential right to a jury trial on factual issues are all necessary matters inherent in the judicial system heretofore created to provide Defendants with due process of law. The lower court's Order of June 26, 2000, was issued without compliance with the due [process] rights of

the Defendants as expressed in the North Dakota Rules of Civil Procedure.

The District Court does not have the authority to short circuit the process. While the former judgment may involve the same option contract [Option to Purchase], it did not determine all rights relating to said Option to Purchase. There may be a course of action open to Matrix Properties Corporation if it feels aggrieved by the factual situation presented after November 2, 1999 [or even after it started its original Complaint for Specific Performance on July 9, 1999], but its motion prompting these proceedings, and the resulting declaratory Order were totally without statutory or procedural basis, and contrary to the due process rights of Defendants – as well as those individuals or entities that are not presently even parties to the litigation.

POINT 5. INSTEAD OF BRINGING A POST-JUDGMENT MOTION, MATRIX PROPERTIES CORPORATION SHOULD HAVE STARTED EITHER A DECLARATORY ACTION OR AN ACTION FOR SPECIFIC PERFORMANCE FOR MATTERS THAT OCCURRED POST-JUDGMENT.

James A. Grettum and TAG Investments are entitled to a proper factual hearing as to all factual matters that occur subsequent to the November 2, 1999, Judgment to determine if Matrix Properties Corporation's actions constituted a counter offer [counter proposal]. Those matters occurring *subsequent* to the Judgment (and matters not passed upon in the former Judgment) are not controlled by said Judgment, and are not bound by the doctrine of *res judicata*. See *Nodland v. Nokota Co,* 314

N.W.2d 89 (ND 1981). In order for any issue to be considered precluded by the doctrine of *res judicata*, it is not enough that such issue was involved in an earlier action, but must have been actually litigated and decided in such action. See *Matter of Nelson's Estate*, 281 N.W.2d 245 (ND 1979) and *Dolajak v. State Auto and Casualty Underwriters*, 252 N.W.2d 180 (ND 1977). If it is not certain that the same question was determined in another action in favor of the party relying on the judgment therein as conclusive as to a point in question, the judgment is not *res judicata* on such point in question. *Knutson v. Ekren*, 5 N.W.2d 74 (ND 1942).

The Supreme Court's judgment, entered in this case on May 30, 2000, reveals the only facts determined, and acts as *res judicata* only as to those facts involving the June 1, 1999, deadline and closing of the twenty acres on June 28, 1999.

Whether Matrix Properties Corporation's notice of the exercise [of] the option in July, 1999, was consistent with the Option to Purchase has not been passed upon by any court to date, and was not part of the relief afforded Matrix Properties Corporation on November 2, 1999.

There are no facts found within the Supreme Court of North Dakota's decision (which is the decision that forms the potential basis for a *res judicata* claim) as to whether the July 1999, letters to TAG Investments and Grettum constituted a proper exercise of the option that did not result in a counter offer. Issues relating to Matrix Properties Corporation's July, 1999, notice, and its attempts, or lack of attempts, to close were not appropriate to summary judgment as of November 2, 1999. Facts relating to the July, 1999, notice were not necessary to determine the

final judgment that was entered on November 2, 1999, and affirmed by the Supreme Court of North Dakota.

The Judgment of November 2, 1999, should not in any way, shape, or form prevent Grettum and TAG Investments from having the right to a factual hearing concerning the factual issue(s) [and properly developed by discovery under the North Dakota Rules of Civil Procedure] as to whether Matrix Properties Corporation's efforts to purchase 114 acres from July 1999, through December 22, 1999, was a counteroffer because its efforts were inconsistent with the terms of the subject Option to Purchase. These later facts, some being in dispute, were not involved in the former Judgment. Also important, most of those facts arose more than 45 days following the November 2, 1999, Judgment.

If it feels it has a legal and factual basis, Matrix Properties Corporation must initiate either (a) a new action for specific performance, or (b) an action for a declaratory judgment.

The due process right of both TAG Investments and James A. Grettum would require a factual hearing on the disputed facts that were not passed upon by the former judgment, or those occurring post-judgment.

The District Court's Order of June 26, 2000, which presumes facts that were not passed upon by the prior litigation and that affect substantive rights of the parties, is inconsistent with TAG Investments' and James A. Grettum's right to due process of law.

II. Addressing Matrix Properties Corporation's Law and Argument.

As set forth in the Introduction to this Brief, TAG Investments knows that Matrix Properties Corporation has never accepted unconditionally the terms of the Option to Purchase. Matrix Properties Corporation's attempt to exercise option rights in 1999 were merely counteroffers and constituted a rejection of the Option to Purchase. Its present Brief and argument also establishes that Matrix Properties Corporation, to this date, is still trying to deny TAG Investments' certain rights expressly set forth in the Option to Purchase.

A. TAG Investments Is Only Bound By What The Option To Purchase States – Not What Matrix Properties Corporation Wants The Option To State.

The Law and Argument expressed in I(A) of Matrix Properties Corporation's Brief is but one more example of Matrix Properties Corporation putting a counteroffer on the table.

Paragraph 13 of the Option to Purchase provides that Matrix Properties Corporation would have 15 days after the exercise of the option to examine the Abstract of Title. It is noted that from July, 1999, through the end of December, 1999, and until the oral arguments before the Supreme Court, TAG Investments had believed that Wylie still had, in its possession, two Abstracts of Title previously delivered to Matrix Properties Corporation in 1996. Matrix Properties Corporation now concedes that it lost the two abstracts owned by TAG Investments and entrusted to Matrix Properties Corporation. Matrix Properties Corporation provided different abstracts of title in December of 1999. Matrix Properties Corporation did not

accept TAG Investments' title as set forth in the title opinions of Daniel Bueide, attached to the Affidavit of James A. Grettum, and demanded corrective work on the part of TAG Investments. Paragraph 13 of the Option to Purchase, though, states as follows:

> "If the abstract of title fails to disclose the title of TAG to be good and marketable or if there are easements, restrictive covenants or mineral grants and reservation of record not acceptable to Buyer as permitted encumbrances, or if there are building zoning laws, ordinances or state and/or federal regulations that would hinder Buyer's intended use of the Property, WYLIE, at WYLIE's election, may declare this option and the exercise or partial exercise thereof null and void, or WYLIE may offer TAG a reasonable time (but not more than 120 days) in which to make the title good and marketable or the concerns as to the acceptability of easements, restrictive covenants or mineral grants and reservations of record and building and zoning laws, ordinances and state and federal regulations addressed to Buyer's satisfaction. No objection can be raised, however, for matters stated to be acceptable in paragraph 19 below. **If TAG agrees to attempt to cure the defects, TAG shall use due diligence in the effort to do so. If TAG does not undertake to make the title good and marketable and/or acceptable or is unable to make the title good and marketable and/or acceptable within such reasonable time as granted by WYLIE, it shall be at the option of WYLIE either to accept the title in its existing condition with no further obligation on the part of TAG to correct any defect or again have the right to declare its exercise of this Option Agreement void as to the Individual**

> **Parcel selected or to declare the entire Option Agreement void. Any Option Money paid or amount paid for Street Assessment theretofore shall be refunded to WYLIE should WYLIE select the latter option.** (Bold supplied for emphasis.)

In December 1999, Matrix Properties Corporation did not allow TAG Investments' stated contractual right as set forth in Paragraph 13 of the Option to Purchase. Assuming a valid exercise of the Option to Purchase, TAG Investments had the right to (a) make title good and marketable or (b) decline to make title good and marketable. Matrix Properties Corporation was to either (a) accept the title in existing condition if TAG Investments did not intend to make title good and marketable or (b) declare the option void in whole or in part. Matrix Properties Corporation's present motion still does not recognize the clear words of the Option to Purchase that *TAG Investments does not need to do any corrective work.*

For obvious reasons, Matrix Properties Corporation never attempts to justify it failure to honor the 45 day time requirement for closing set forth in the Option to Purchase – a clear rejection of the terms of the Option to Purchase. TAG Investments did not accept any counteroffer, nor could it accept any counteroffer while the Option to Purchase was in effect [prior to Matrix Properties Corporation's default on February 28, 2000, or even the later possible date of June 1, 2000, when additional land was not "purchased"].

Matrix Properties Corporation further asserts that NDCC § 47-10-04 would require a warranty deed setting forth certain covenants, including the covenant of fee simple seizen [sic] free from lawful disturbance, and also

free of all encumbrances. However, reference to NDCC § 47-10-04 is inappropriate because the Option to Purchase *does not contain* a promise that TAG Investments would give the "usual covenants."[12] Matrix Properties Corporation attempt to deceive this Court is even apparent in its reference to NDCC § 47-10-04[13] by indentation and single space of certain language – implying it is a quotation of the identified statute. In fact, quotation marks are not included because Plaintiff took the referenced language out of context, and slightly changed the wording.[14] Of significance is Matrix Properties Corporation's failure to include the introductory language of NDCC § 47-10-04 ["The covenants mentioned in section 47-10-03 must be in substance as follows:"], thereby taking it out of context, and improperly suggesting every warranty deed is identical to every other warranty deed in terms of covenants. NDCC § 47-10-03 must be read in conjunction with NDCC § 47-10-04, not heedlessly as suggested by Matrix Properties Corporation. TAG Investments may be subject to the provisions of NDCC § 47-10-19. However, since certain matters may be found defective, yet still accepted, by Matrix Properties Corporation, in order to properly interpret Section 13 of the Option to Purchase, any warranty deed issued by TAG Investments

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[12] **"47-10-03. Agreement to give usual covenants on sale – Duty imposed.** An agreement on the part of a seller of real property to give the usual covenants binds the seller to insert in the grant covenants of seizin, quiet enjoyment, further assurance, general warranty, and against encumbrances."

[13] Plaintiff's Brief, page 8.

[14] " . . . any interest in the same through or for *the party of the first part* on demand . . . " from the statute becomes " . . . any interest in the same through or for *him* on demand . . . " in the Plaintiff's Brief.

could except matters Matrix Properties Corporation found acceptable. Otherwise the warranty deed would alter the terms of the Option to Purchase that explicitly provides that TAG Investments need not do any corrective work.

At this point in the argument, the undersigned feels compelled to note that the above comments about the acts of deception on the part of MATRIX have been made before – MATRIX continues to make the same mistakes without correcting them. In June, 1999, their lawyer acknowledged that he had not read the Option to Purchase. Apparently their lawyers do not read our replies to their motions either.

Matrix Properties Corporation sets forth absolutely no written words within the Option to Purchase which would require TAG Investments to correct any title defect. Its attempt to do so constitutes not only a rejection of the option to purchase but an attempt to have the judiciary rewrite the contract. It argues implicitly that TAG Investments is violating a "implied covenant of good faith and fair dealing" as expressed by the Supreme Court in *Barnes v. St. Joseph's Hospital*, 1999 ND 204, 601 N.W.2d 587 (ND 1999). However, the implied covenant of good faith and fair dealing cannot negate substantive terms found in the Option to Purchase, [terms including, but not limited to, TAG Investment's absolute right to choose *not to correct* title defects].

B. Grettum And The Various Parties He Represents are Required to Convey Quit Claim Deeds to Plaintiff.

There is a conclusive presumption that the deed to Carol Grettum is supported by consideration. See N.D.C.C. § 47-10-23.1. Matrix Properties Corporation demands an

affidavit of non-homestead or the joining of spouses of Rostad, Richard or Grettum. The spouses are not parties to this action [if an action even exists] and are not subject to any specific performance order. North Dakota Century Code §32-04-12 states that the following obligations cannot be enforced specifically:

> "3. An agreement to perform an act that the party has no power lawfully to perform when required to do so.
>
> 4. An agreement to procure the act or consent of the spouse of the contracting party or any other third person."

In the instant case, this Court did not order TAG Investments to correct title, nor can it do so. Certain third persons, including Rostad, Richard, or Carol Grettum, are not parties to this lawsuit and cannot be compelled to act. Another reason that Carol Grettum, as grantee of Clapp Family Trust, cannot be compelled to be subject to specific performance for the conveyance as envisioned by Matrix Properties Corporation in its Motion is that specific performance cannot be enforced against a person who has not received adequate consideration. NDCC §32-04-13. Nothing within Matrix Properties Corporation's motions provides for Carol Grettum to have any consideration.

Lis pendens laws have no application to the interest that Carol Grettum received that stems from the Clapp Family Trust. Matrix Properties Corporation contracted with TAG Investments, *and TAG Investments alone*, for an option to purchase. James Grettum consented to a potential quit claiming in order to cure a defect **previous** to October 14, 1996. The Judgment of the Supreme Court merely indicated that the option to purchase was still in

effect and did not expire by its own terms because of Matrix Property Corporation's failure to close on twenty acres prior to June 1, 1999. Carol Grettum received her interest from a warranty deed from James Grettum and stands now in the shoes of the Clapp Family Trust. The only notice that she has from any action is that the identified June 1, 1999, date did not control as far as the termination of an option to purchase between TAG Investments and Matrix Properties Corporation. This determination has nothing to do with the title that she received from the Clapp Family Trust. Moreover, Carol Grettum knew that Matrix Properties Corporation was in default of the Option to Purchase after February 28, 2000, when it did not pay the required option monies.

Even the deeds attached as Exhibit A to Plaintiff's Motion do not comply with the Option to Purchase. Paragraph 13 of the Option to Purchase provides that TAG Investments has no obligation to correct title, and Exhibit A indicates that TAG Investments will warrant and defend against matters of title. The Option to Purchase did not contain any agreement that any "usual covenants" would control.

Similarly, the quit claim deeds do not comply with the Option to Purchase. Matrix Properties Corporation's proposed quit claim " . . . release any and all interest of the grantor" when Paragraph 11 of the Option to Purchase only required quit claims as to matters **previous** to October 14, 1996.

Nothing within Paragraph 11 of the Option to Purchase requires Grettum, Rostad, or Richard to execute quit claim deeds to someone who is not the record title owner of the property.

The settlement statement contains a deduction for county taxes of $2,313.44 which is not authorized by the terms of the Option to Purchase. Although taxes were to be prorated to date of closing, there is nothing in the Option to Purchase that says that TAG Investments would be required to pay its share of the taxes *prior* to the due date of the taxes. There is nothing within the Option to Purchase that allows Matrix Properties Corporation to use TAG Investments' money by withholding from it at time of closing.

The closing did not close within 45 days of the date of the notice [the only identified notice is July 1, 1999, over a year ago].

The option has terminated because Matrix Properties Corporation failed to pay option monies – even after properly notified of the deficiency. TAG Investments further submits that the latest proposed closing comes at a time that the option has terminated because Matrix Properties Corporation failed to pay option monies even after being properly notified with 30 days' notice of the default as required by the terms of the Option to Purchase.

The terms of ¶6 of the Option to Purchase were not complied with by Matrix Properties Corporation – through no fault of TAG Investments. Minimum acreage had not been purchased prior to June 1, 2000. The past tense of the pertinent word ["purchased"] within Paragraph 6 indicates that it must be an *accomplished act of possession*. The word "purchased" refers to a completed act, not an executory contract. Utilizing the Supreme Court of North Dakota's definition, the word "purchased" required the completed act of taking real property, the completed act of acquiring real property, or the completed act of

obtaining real property. Taking, obtaining, and acquiring can be equated with possession, and therefore, since Paragraph 6 says "must be purchased" [using a past tense], Matrix Properties Corporation must have been in possession by June 1, 2000, of 40 acres. This act did not happen. Even the closing statement proposed by MATRIX says that the change of possession to MATRIX has not occurred as of yet. The tax proration date is the date of the change of possession.

This Court cannot force a counteroffer down the throat of TAG Investments – especially when it does not have jurisdiction. TAG Investments had contractual right(s) that are not being honored by Matrix Properties Corporation. After default under the terms of the Option to Purchase on February 28, 2000, and most certainly after termination of the Option to Purchase on June 1, 2000, Matrix Properties Corporation lost whatever rights it earlier acquired.

* * *

POINT 8. THE DEFENDANTS ARE ENTITLED TO A JURY TRIAL ON THE ISSUES RAISED IN PLAINTIFF'S MOTION.

Plaintiff has changed the relief it seeks in this Motion from what it sought prior to judgment. At the time of the Judgment on November 2, 1999, Plaintiff sought a declaration from the Court that the Option to Purchase was still in effect because of its performance by Plaintiff's acquisition of twenty acres in June 1999. Under the present motion, the scope of this action has changed so that now Plaintiff is requesting damages for a claimed

delay in closing occurring post judgment. Matrix Properties Corporation is now trying to wrest the physical possession of the property from Defendant TAG Investments. When a plaintiff claims to own the property while a defendant is in possession, and the plaintiff seeks to recover such possession as well as to determine defendant's adverse claim, the action is a legal one and the parties are entitled to a jury trial. See *Burleigh v. Hecht*, 117 N.W. 367, 370 (S.D. 1908):

> "It is an action brought to quiet title by a party out of possession against one claiming title and in possession. In such an action either party is entitled to a jury as a matter of right. (Citations omitted) . . . In the latter case of *Haggin v. Kelly*, 136 Cal. 481, 69 Pac. 140, that court held:
>
> > 'If the action were viewed as an action to quiet title or to determine an adverse claim, under section 738 of the Code of Civil Procedure, the Plaintiff being out of possession, and asserting title, and seeking recovery of possession, the plaintiffs would be entitled to a jury trial.' . . . when the action is to recover possession of real property, it is in the nature of an action at law, and not in equity, and it necessarily must be so, for the reason that an action in equity could not have been maintained under the old equity system to quiet title, as the plaintiff in such an action was required to allege and show that he had no remedy at law, and where the plaintiff was out of possession he clearly would have had a remedy at law under the old action of ejectment."

Said South Dakota case was cited with approval in a North Dakota case entitled *Interior Lumber Co. v Kunert, et. al.*, 237 N.W. 780, 782 (N.D. 1931). Being based in law and not equity, a jury trial is also available for the alleged damages Matrix Properties Corporation seeks in its Motion.

* * *

exercise by Matrix Properties Corporation occurring prior to June 2, 2000, the Option to Purchase should be considered terminated by its own terms effective 11:59 p.m., June 1, 2000. TAG Investments assertion is completely consistent with its June, 2000, position that the Option to Purchase had expired by its own terms.

It is noted for the present Motion, when Matrix Properties Corporation demands that TAG Investments' correct title or else pay Matrix Properties Corporation's damages, Matrix Properties Corporation is acting inconsistently with the Option to Purchase. Nowhere within ¶13 of the Option to Purchase is Matrix Properties Corporation given a choice to demand TAG Investments to correct title. Matrix Properties Corporation's present demand [as prayed for in its present Motion] is not an option available to it under the terms of the option. An acceptance introducing new terms or conditions other than those offered in the Option to Purchase amounts to the rejection of the Option to Purchase without forming a contract. *Berg v. Lien*, 522 N.W.2d 455, 456 (N.D. 1994). An exercise of an option upon different terms and conditions provided within the option amounts to a rejection of the option and is a mere counteroffer. *Matrix Properties Corp. v. TAG Investments*, 2000 ND 88, 609 N.W.2d 737. As of June 1, 2000, there cannot be said to be a contract in

existence, nor timely performance by Matrix Properties Corporation, and the Option to Purchase expires by its own terms. This Court has no authority to rewrite the clear and unambiguous contract terms because Matrix Properties Corporation has expressed a desire to purchase TAG Investments' interest under different terms than contained in the Option to Purchase.

SUMMARY

The District Court does not have jurisdiction over the parties or the subject matter. The District Court does not have jurisdiction over persons or entities that have never been made a party to the original action. The District Court is wrongfully being invited to commit error of constitutional dimensions. This District Court should take no action beyond recognizing such concerns by dismissing the pending motion for such reasons. If Matrix Properties Corporation feels capable of supporting another action with law and fact, let it do so according to Due Process of Law.

* * *

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

TAG INVESTMENTS, JAMES A. GRETTUM, CAROL A. GRETTUM, and JONATHAN T. GARAAS,

Petitioners,

v.

MATRIX PROPERTIES CORPORATION, a MINNESOTA CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of North Dakota

APPENDIX TO PETITION FOR WRIT OF CERTIORARI VOLUME II, PAGES 171 TO 392

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IN DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA.

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation, Plaintiffs, vs. TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota, Defendants.	File No. CV-99-02045 MOTION TO COMPEL TRANSFER OF DEEDS/ PROPERTY

TRANSCRIPT

OF

PROCEEDING

Taken at Cass County Courthouse Fargo, North Dakota.
November 7, 2000

BEFORE THE HONORABLE FRANK L. RACEK
– – – DISTRICT JUDGE – – –

* * *

[26] At any rate, that closing got unilaterally canceled too. We had nothing to do with setting it up, we had nothing to do with canceling it, they did it all themselves. The Option to Purchase, Your Honor, is over because they didn't pay the option monies and they didn't buy the necessary amount of land by an accomplished act on June 1, the year 2000. This Court has never, ever issued an

order that said that we were ordered to close. They falsely have represented that [27] repeatedly. And don't get sucked into their lie.

This order – this Court has never ordered us to transfer 94 acres. This Court has never said it before this Court. Judge Erickson never said it before – he was acting on this case. Don't get sucked into the lie, in terms of making that representation. This Court does not have jurisdiction over any amendment and we've cited all sorts of things that show that. But importantly, Your Honor, we said that in July. Now they've had four months, July, August, September and October, into November now, to tell you what rule of the North Dakota Rules of Civil Procedure or what statute or what case they are relying upon that would give you the right to amend the November 2, 1999, judgment. By my account, it's Rule 52, 59 and Rule 60. They apparently won't give you things in evidence, sworn to under oath, but they also don't dare make a representation of evoking a Rule of Civil Procedure that doesn't apply to them. Because all the time tables for those, with the exception of possibly Rule 60, have long since elapsed. And we get into the law on that too. So you have what happens here, Your Honor, is they have, in fact, made representations to the Court that are lies, flat out. I've said it, I've challenged them repeatedly and they don't rise to prove to me any evidence that they've submitted that said they have tendered anything towards accomplishing the Option to Purchase. They've never identified the order [28] for closing or an order for transfer despite challenge repeatedly because they know that none exist. And they're asking this Court to order us to do something, which according to the terms of the Option to Purchase,

were something that we were not compelled to do. They are asking –

THE COURT: Let me see a copy of the judgment. Everything in my file is in Bismarck.

MR. GARAAS: Your Honor, for – under the submission, documentaries number one is the memorandum opinion and number two is the judgment.

THE COURT: Okay. Alright, anything else?

MR. GARAAS: Your Honor, in an attempt to be as brief as I can, I would just like to point out that we – in points one and two we have specifically addressed the issues of the jurisdiction of the Court and the other side has never countered it. In terms of point three, we pointed out Rule 52, 59 and 60 haven't been complied with. They have not done anything to undue time of the essence, they have failed to recognize that if we – if they had issues that have arisen since the summons and complaint, or since November 2, they can bring another action. We are not precluding them from bringing another action. But that provides for summons and complaint, service, answers, discovery and potentially even jury trials, because what they're trying to do is a form of ejectment, and I believe it's called a tort of ejectment.

[29] They're trying to rest away our physical possession of the property, which is contrary to their argument that it somehow became their property on July 1, 1999. If we have possession of the property, in fact, possession of the property under the Option to Purchase is, in fact, still ours, we own the property to the extent that we own it, we have interest in the property and we are responsible for the taxes on a pro ratio basis. And even their proposed

settlement provides for pro ration of taxes to November 15, the year 2000. They can always start their new action. They have never unconditionally accepted the terms of the Option to Purchase. They have set up new ones and we have no duty to correct the title.

The next thing is that that they have never included interest in their arguments so their numbers are absolutely wrong even if their law was correct, which it isn't. If they are entitled to the possession of the acreage – the rest of the acreage by paying us $9375 per acre and whatever interest we have, they have to tender us also the interest at six percent under the law. They've never done that. Even to this very moment, probably Mr. Spaeth is hearing about it for the first time because that was in the brief that we responded – that we recently served and they haven't responded to that. Didn't mention it. So he probably didn't read my document.

In terms of the right of selection, if in fact there was a contract that did still exist, which there isn't, our [30] North Dakota statute provides for a right of selection and we have selected in our brief. And then the affidavit of James Grettum, our right to have the individual selection void under the Option to Purchase because they haven't acted. There was only three options. The fourth option isn't there. The fourth option to compel us to do things that are not within the Option to Purchase are not there. They haven't complied with the option. They probably heard about this for the very first time right now too.

So in terms of is there anything more, Your Honor, we will stand upon this record and the only evidence that is submitted to this Court. These people are trying to pull a flim-flam. These people are trying to pull a sham. They're

trying to ask for a judicial rewrite. They're asking you to exceed your jurisdiction. And it should not be tolerated when they don't even follow the rules. You can see that yourself because the timeliness has now been twice inflicted upon us. We have to respond by working on the weekends because they don't follow the Option to Purchase or the law and it can't be tolerated anymore, Your Honor.

* * *

[38] MR. GARAAS: And is the Court ruling on the evidence that they supplied because there is none that they supplied? Is the Court relying upon the evidence that it's pulling from thin air, because the only evidence is from our side saying that it didn't happen? So, is the Court identifying making a factual finding as to what facts its finding to exist? Because in terms of the tender that the Court mentioned, hasn't ever been made. And Mr. Spaeth doesn't even make that tender. And there's reference as to the interest that would theoretically be due under the law. So this Court is asked to answer, in violation of due process of law, at a time of – it's untimely, based upon lack of evidence, Your Honor. I know of no court proceeding that can be based upon noncompetent, incompetent and nonexistent evidence.

THE COURT: Yeah, but this is no longer a trial. The case has been reduced to judgment. It's been affirmed on appeal. The Plaintiffs have the right to buy the land that's subject to this contract for 877,000 plus dollars. If they put the cabbage on the table, you convey it. If you can't convey it, then you better come in and show that it's impossible for you to do so, which I haven't heard yet. Or –

MR. GARAAS: The title exam is already apart of the record, Your Honor. We don't own the 94 acres that

they want. If they want to accept our title, we'll take the – we'd have taken it during the time period that is was in operation. Not [39] after the fact.

THE COURT: Yeah, but the fact the title's no longer in your name, from what I've heard, isn't going to wash here because it was – they're in a position to convey, they convey. If they don't convey, then we go to plan "b" based on whatever the circumstances are.

MR. GARAAS: So you're –

THE COURT: You resubmit your order with one and two and the subparts.

MR. SPAETH: Thank you, Your Honor.

THE COURT: And –

MR. GARAAS: And no factual findings, Your Honor?

THE COURT: No, there's no – this is enforcement of the judgment. So the order is appropriate. If Grettum's not in a position to get these quitclaim deeds from some of these third parties that are mentioned, for reasons other than he doesn't feel like doing it, then we can come back and talk about what the remedy is going to be, whether that's title insurance or subpoena these folks in and ask them if they're going to sign or whatever the circumstances are. We'll deal with it piece by piece, but he's–

MR. GARAAS: And what portion of the judgment does Grettum have to do that, Your Honor? Because Grettum is signing only to give a quitclaim deed to convey his interest in effect as of October of 1996.

[40] THE COURT: Well, you might be right on that. I might be confusing the partnership in Grettum and Grettum as a partner as I understand it. But they are required to convey by warranty deed, this property. So that will be done. And if it's necessary to cure these defects that this be done, these other matters, then that will be done. And at that time, you will walk out with 877,000 and some odd dollars.

MR. GARAAS: Your Honor, we don't have to do anything until they put it on the table.

THE COURT: Yeah.

MR. GARAAS: They have never tendered it, even from the very moment. The law says that they have to tender before we have an obligation to do a single thing.

THE COURT: Well, do you want to sign your deeds in Court here? We'll have them stack the cabbage up. Do you want them to hire the Brinks (phonetic) man or what? Tens, twenties, whatever you want.

MR. GARAAS: After they comply, we will comply if there's an Option to Purchase in effect, Your Honor. But they haven't done that, Your Honor. And that's what I'm trying to say. That they have to follow the Option to Purchase and the law too. And they haven't done it.

MR. SPAETH: Well, I think –

MR. GARAAS: And Mr. Spaeth has misrepresented facts and law.

[41] MR. SPAETH: – I think I can clarify matters here. The Supreme Court has considered this. The law does not require a feudal act. We exercise the option after

a big rigamarole, we finally conceded that at the Supreme Court. The law does not require a feudal act. They told us to jump in a lake. We have no rights under the option that we brought this lawsuit.

MR. GARAAS: When you're talking –

MR. SPAETH: The Supreme Court clearly recognized that and –

MR. GARAAS: Mr. Spaeth –

MR. SPAETH: – he's just misstating the law, Your Honor.

MR. GARAAS: Mr. Spaeth is not representing truth as to what was said at the Supreme Court or what the Supreme Court decision is. The Supreme Court affirmed the judgment and told them not to deviate from the terms. They have deviated from the terms. We don't have any right or obligation to accept theirs. We don't have to accept their proposal. They have never shown this Court how they have accepted the terms of the Option to Purchase. They've never tendered it. There's no facts that they have ever done those things. There's nothing that the Court can have before it, in this Court's file, any place, that they have complied with the Option to Purchase. And we don't have to do anything until [42] they do. And the next step was for them to give the title opinion and say, we either correct it or we will accept it.

THE COURT: Yeah, that's not going to happen. So let's get off that because –

* * *

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Matrix Properties Corporation, formerly known as EW Wylie Corporation, a Minnesota corporation,

Plaintiff-Appellee,

vs.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota,

Defendants-Appellants.

Supreme Court
No. 20000192

Civil No. CV-99-02045

MOTION TO VACATE DISTRICT COURT ORDER OR ALTERNATIVELY, MOTION OR APPLICATION TO THE SUPREME COURT TO EXERCISE ITS SUPERVISORY POWERS

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PLEASE TAKE NOTICE That Appellants TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota, hereby

move this Court to vacate an Order of the District Court of Cass County dated November 8, 2000, or alternatively, said Appellants move or apply to the Supreme Court of North Dakota to exercise its supervisory powers over the District Court of Cass County, North Dakota. The grounds for this Motion are as follows:

1. That the Order of November 8, 2000, acts as an amendment to a Judgment in a case that is on appeal in the Supreme Court of North Dakota and should be considered to be void as a matter of law. The lower court lacked jurisdiction at the time of the issuance of said Order.

2. The lower Court's Order of November 8, 2000, is based upon an interpretation of the November 2, 1999, Judgment that renders the Judgment void as being a conditional judgment.

3. That the Order of November 8, 2000, was issued without due process of law afforded to Appellants TAG Investments and James A. Grettum. That due process violations include, but are not necessarily limited to, the following:

a. The Motion of Matrix Properties Corporation was heard upon inadequate notice. The Motion was mailed to counsel for TAG Investments and James A. Grettum which, pursuant to Rule 6(b) of the North Dakota Rules of Civil Procedure, would require three days to be added to the required fourteen days notice for a total of seventeen days. There was only fifteen days between the date of the mailing and the time for the hearing.

b. The Motion of Matrix Properties Corporation was made without any submission of facts on

the part of Matrix Properties Corporation and the Order was issued without a determination of any facts by the lower court. The issuance of an order without a proper factual basis denies due process to the Appellants because the court acts arbitrarily.

c. Matrix Properties Corporation's underlying motion was in the nature of a request for supplemental declaratory relief under N.D.C.C. §32-23-08, but declaratory relief is no longer available to Matrix Properties Corporation.

d. Matrix Properties Corporation's Motion gives rise to issues of fact. A jury trial was properly demanded by Appellants TAG Investments and James A. Grettum and the denial of a jury trial constitutes a violation of Appellants' due process rights. Further, the Court issued its Order without determining any facts.

3. That the actions of the District Court of Cass County, North Dakota, in issuing the Order of November 8, 2000, while an appeal is pending, deprives TAG Investments and James A. Grettum of the benefit of their present appeal. The matters decided by the District Court necessarily involve issues that are on appeal to the Supreme Court and are not collateral to the issues on appeal. An amendment of the judgment while this case is on appeal should not be tolerated by this Court.

In the event the Order is not vacated, Appellants TAG Investments and James A. Grettum move this Court to stay the effect of such Order pending the determination of the issues now upon appeal.

This Motion is based upon all facts and proceedings evidenced by the Addendum to the Motion to Vacate District Court Order or Alternatively, Motion or Application to the Supreme Court to Exercise Its Supervisory Powers.

Dated this 15th day of November, 2000.

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IN DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA.

Matrix Properties Corp, f/k/a E. W. Wylie Corporation, a MN corp., Plaintiff, vs. TAG Investments, a ND partnership, and James A. Grettum, and individual, Defendants.	File No. CV-99-02045 **STATUS CONFERENCE**

TRANSCRIPT

OF

PROCEEDING

Taken at
Cass County Courthouse
Fargo, North Dakota
January 2, 2001

BEFORE THE HONORABLE FRANK L. RACEK
- - -DISTRICT JUDGE - - -

* * *

[6] MR. GARAAS: – Your Honor, I have never seen any Order from this Court noticing this Status Conference or Pretrial Conference under Rule 16(a).

THE COURT: No. My concern is when we left last time, we weren't – when I had thought about this afterwards we weren't clear about what we were going to do with these three pieces, and I wanted to make it absolutely concrete the plan we have for Friday so that the

Court's time isn't wasted on Friday so that's why we are here.

MR. GARAAS: Well, Your Honor, when did the Court communicate with Matrix about that because I didn't have any –

THE COURT: I told the Calendar Clerk to schedule it.

MR. GARAAS: And the Calendar Clerk contacted Matrix?

[7] THE COURT: I have no idea.

MR. GARAAS: Because I didn't have any notice of it whatsoever. I got a notice from Mr. Spaeth that there was a Status Conference scheduled for this time without any communication whatsoever from the Court or from written request from Mr. Spaeth. The Rule provides for that, Your Honor.

THE COURT: Then somebody should apologize to you for not including you, but this was at the direction of Court, but the question is is your client going to sign a Warranty Deed when he is ordered to do so on Friday?

MR. GARAAS: It depends on what the Warranty Deed[s] says, Your Honor. There is a lot of things that are going to have to be resolved, and I guess frankly I have a question in my mind as to whether or not the Court wants to enter into a course of action that places the trial court judge and the State of North Dakota at risk. There is some issues of jurisdiction, the Court acting in excess of its jurisdiction, or acting without due process or law. We are talking the terms of no evidence now or ever have been presented, no legal basis. None has ever been presented.

We are altering the final judgment. We are altering a contract. There is a loss of jurisdiction due to a December 15th appeal. There is a loss of jurisdiction due to a July appeal that is still pending before the North Dakota Supreme Court. There is a [8] violation of federally protected rights under 42 United States Code, 1981, 1982, 1983, 1985, 1986, and 1988.

We're essentially asking the Court to recognize that in fact if they are coming in and asking for a suit for specific performance and at the same time that they are asking for damages, there is an election of remedies issue that has to take place.

There is a question of whether or not they have the right to pursue anything at all because if there is a claim for damages that means that they are no longer pursuing their equitable remedy of specific performance which would in fact have been an alteration or a modification of what we thought was an otherwise valid and final judgment dated November 2, 1999, Your Honor.

We have a question as to a number of things which we have been denied the opportunity to have termination dates that are put in the contract enforced. We have been denied the opportunity for hearings on all of these things. So when you ask me a question as to whether or not we are going to sign a deed, there are so many things that still have yet to be resolved that why would the Court want to put this Court and the State of North Dakota at risk when we are guaranteed to have another lawsuit, guaranteed to have another trial to determine whether or not there has been damages or a quiet title action and establish what the record is for this [9] property.

* * *

[11] MR. GARAAS: Your Honor, with all due respect, we are not talking about an appeal because we are talking about lawsuits. This man has just asked this Court to engage in conduct which would in fact exceed the Court's jurisdiction.

Number one, I don't ever remember, and I know that it has never occurred where any portion of this lawsuit mandated us to exercise our option with Clapp Family Trust in order to get that 35.52 acres that they identified in terms of their numbers. There is nothing in this record whatsoever that would mandate us to exercise that option, and in fact that would constitute a modification of the original judgment that merely asked us to specifically perform according to the Option to Purchase dated October 14, 1996.

In terms of the numbers that Mr. Bueide has represented as solid numbers, they are absolutely wrong. Those numbers were not ever agreed to, and for the fact of the matter, could never have been used unless there was a closing prior to [12] December 31, 2000. Under the terms of the Clapp Family Trust, the numbers will never be known on or after January 1, 2001. There is a Consumer Price Index number that will not be known until February, and as a result of that, the number of $202,000.00 will not be valid. In fact, the fact of the matter is, is that the only way that under the Option to Purchase dated November 14, excuse me, October 14, 1996, that they could ever assert any number would require TAG, excuse me, would require Matrix to pay $9,375.00 per acre to the Clapp's Family Trust not any lesser number.

In terms of a judicial taking, what they have just asked is that you take property which was not the subject

of any prior motion or order that has ever resulted in a final order of the Court. The judicial taking would be a violation of the North Dakota Constitution aside from the federal constitution and the – all of those federal statutes.

I think it is important to note that making and enforcing contracts under 1981 United States Code, Section 42, United States Code, 1981, making enforced contract says that that's one of our civil rights, and then it defines it and it say's that is to have the termination provisions of a contract to be also enforced.

This Court is being asked to pick and choose one or two terms that Matrix finds acceptable and to reject approximately 10 or 12 terms that we have built into the contract that was [13] written by Matrix that would give us options or alternatives, depending on what they do. This Court has never heard, never heard any evidence of any compliance by Matrix from and after July 1, 1999, or July 2, 1999, and the law of this case never appealed by either side and made part of the law this case in Judge Erickson's opinion, is time of the essence. One of the terms of the Option to Purchase, requires, demands that the Option to Purchase exercise must be closed within 45 days, and there is not one shred of evidence from July 2, 1999, for 45 days that our side did one thing to stop that closing from taking place. There is not one shred of evidence, nor is there anything that would waive time of the essence. I think that the Court should be aware of an *E.E.E., Inc., vs. Hanson*, 318 N.W.2d, 101. It has been previously briefed to the Supreme Court. Mr. Spaeth is undoubtedly aware of it. At page 104, normally parties to a contract who are allowed to write the terms of the contract themselves. A case is cited. A Court may be called upon to interpret a contract written by the parties thereto, but the

Court's authority to interpret a contract does not give a Court the authority to modify it. There is a case that is cited.

* * *

[20] MR. GARAAS: And what are those consequences available to the Court for exceeding its jurisdiction and ordering something that takes away termination rights under a contract? I notice that there has never been by Mr. Bueide or Mr. Spaeth a resuscitation of any legal basis for this Court to act. There has been no hearing to determine whether or not those numbers are even correct, and in fact, I know that they are not correct, Your Honor.

THE COURT: Well we are certainly willing to listen to your input in that regard Mr. Garaas, and get it right down to the penny, but you are not giving us much help.

MR. GARAAS: Because we are supposed to have a trial on that day, Your Honor. We are supposed to have a trial to determine whether or not there is in fact been a valid exercise' of the option followed by each one of the 12 steps that are outlined on our table, which are conditions precedent to ever getting to a date of closing. We have not for instance, Your Honor, ever gotten past the second point, that is, the issue of the requirement to do corrective work under the Option to Purchase because after we give them the abstract, and they have it, and the Supreme Court took care of that, they have to give us the title opinion that they do. If [21] the title opinion says that there is no good title, then we have options, Your Honor. One of the overriding concerns that was built into this Option to Purchase mandatory provision because it never would have been signed had it not existed because we

never owned any of this land on October 14, 1996, is we get to make the decision as to whether or not we will do anything to correct the title. If we say no we will not take any step to correct the title, then the burden shifts to them. They have three alternatives, accept the title that we have, reject the option exercised at July 1, or July 2, 1999, and they are put back to where they were before, or the third option is to declare the entire Option to Purchase dated October 14, 1996, over, null and void. Then they get their option monies back. They didn't exercise any of those options, Your Honor. They've made you at their invitation – they're making you judicialy rewrite our Option to Purchase to provide for title. We have no obligation to do it. They drafted the documents. Elementary rule of law, if there is any ambiguity, and there isn't. They never said there was any ambiguity or mistake, never is. They drafted it. They knew it was a term of the Option to Purchase, and we can find it. We could live with that.

If we are in fact being judicially forced to exercise with Clapp, then you are taking away our rights under the contract. You are taking away and moving to the end without [22] ever having a trial on those issues. In fact, Your Honor, the Court will be refreshed because it occurred before you were there, but the only closing that was ever scheduled was in violation of the option to Purchase, and it had terms that were unacceptable, and we rejected it. That's why the Supreme Court gave an Advisory Opinion to Matrix. We never ever have had a closing within the 45 days that's mandated by the Option to Purchase. Forty-five days after November 2, if we excuse it because it was pending litigation on November 2, 1999, 45 days, their closing was past time of the essence 45 days. On the *E.E.E., Inc., v. Hanson* case, it specifically says

that they will not rewrite a contract under the guidelines of interpreting it. That's what they are asking you to do, a judicial taking. It is an elementary principle of law, Your Honor. They can't do that. You can't do that, and all we are trying to do is protect our contract and the federal government, even the United States Code recognizes that termination clauses are part of our civil rights.

We are asking that this Court give us our rights that are under that contract and not judicially rewrite a final decision. If they felt that the November 2, 1999, decision was wrong, they could have appealed it, and they didn't. Judge Erickson specially was given a proposed Order providing for a closing, and he refused that Order. He only would go as far as what the evidence said, and that is that the June 1, [23] 1999, transaction had been fulfilled even though it had been fulfilled by James Grettum not by TAG. The contract was in full force for one more year, but it didn't take away the obligation to pay the money on February 28th, and it didn't take away the 20 acre obligation of June 1, 2000, which they never did. That gives rise, Your Honor, those numbers, if they are in fact talking about a closing on Friday of this week, what exercise going back 45 days are they talking about? Because if in fact they are talking about the July 1, 1999, closing, by law we are entitled to interest from that time forward 40 or 45 days, at the minimum, thereafter. These numbers aren't correct, Your Honor. They are asking you to accept things without any evidence, without any legal basis and in violation of the law. We ask and implore this Court not to exceed its jurisdiction. We don't want to see what is coming down the pipe at their invitation.

In terms of the directive to Mr. Grettum, he's ordered to do something. If he is – You are going to have to tell me

because I don't understand how the Court can order somebody to do something when the Court doesn't have the right to issue the Order in the first place jurisdiction, law, facts or whatever.

* * *

THE COURT: So let's just say you come up with this amount, then are you happy as to those 31.5 acres?

MR. GARAAS: No. Absolutely not, Your Honor, because the Court has no right of jurisdiction. All the same things I said before. This Court doesn't have the right to do that, and this Court doesn't have the right to rewrite. This Court doesn't have the right to alter or modify the terms of a final judgment. This Court is being asked to embark upon a course of conduct that is guaranteed to violate people's rights and to these rights and the law.

THE COURT: Well, you know as painful as this has been, the Supreme Court doesn't seem to agree with you. That's why they keep sending it back to me to do something.

MR. GARAAS: Your Honor, with all due respect, if you were waiting for the Supreme Court to send it back to you, [33] then you would be waiting for the final decision of the December 12th decision. It is still subject to petition for rehearing. We have filed that on the 22nd of December. This Court does not have jurisdiction in this case for two – Ok. The appeal that was done in July which is not yet final, and it doesn't have it because we filed an appeal from the November 8th order of this Court upon which you are predicating your action. Your Honor, the Court is actually asking for and asserting jurisdiction

when you don't have it, and that's what we have been trying to tell you all along.

THE COURT: Well I deferred once to the Supreme Court because the case was on appeal, and they sent it back to me and said enforce the judgment. There isn't much more the Court can do.

You want to get me a number by tomorrow at 5:00 and let Mr. Spaeth in on it, how much you think you are owed for each one of these tracts assuming everything would have gone according to [Hoyle] as of July 1 and a closing 45 days later. I'm sure they'll listen to you, and hopefully then we can resolve it as best we can, but without any cooperation, there isn't much the Court can do. If you want to submit a number as to the property that TAG owns what you are entitled to as far as lost interest and overpayment of taxes, and an amount on tract one what if there was a July 1st closing what you would have saved to the Clapp family and what you would have [34] recovered. Also on the tract owned by Carol Grettum, we'll take it and study it.

MR. GARAAS: The fact that the Court is even suggesting that is a concession that the Court realizes that it doesn't have the facts in order to do this on Friday, and those are the facts that would have been presented as part of a secondary step under the Declaratory Judgment that Judge Erickson issued.

The law requires and permits a secondary step, but it also contemplates all of the discovery, the pleadings, the answers, the interrogatories, the depositions, and ultimately even potential way of jury trial on those issues, and that's what they are asking you to side step and disregard.

The law provides for the kind of relief that you want to have, but it also contemplates due process of law and doing all these steps in order to make sure that it is done correctly.

THE COURT: I'm not sure it has not been done correctly. I'm merely saying you can submit it, and the Court will study it. It seems to me they have been trying to give you their money for a long time.

MR. GARAAS: Your Honor, you've said that about three times.

THE COURT: Yeah.

MR. GARAAS: Can you point out or can Mr. Spaeth [35] point out where there was ever a tender of money prior to November 7, 2000? Never once has there been a tender. Then they told you that they had the money, and we find out a couple of days later that they had $900,000.00. Never before November 7, of the year 2000 has there ever been a tender of money, and that doesn't constitute a tender of performance either. They have an option to purchase. They have never tendered performance. They have never tendered the payment, and even the Supreme Court decision, third sentence, recognized they still haven't tendered it as of December 12th of the year 2000.

MR. BUEIDE: If Mr. Garaas is going to go through those calculations as you suggested that he would. They also take into account farm income. There is supposed to be a reconciliation of the farm income so I just ask that he also take that into account.

THE COURT: Now, Mr. Garaas can submit by 5:00 tomorrow any additional monies for interest and

overpayment of taxes to which he thinks he is entitled, and we'll have that for the record.

On Friday then, just Warranty Deed directly from Clapp to Matrix. Transfer the property in tract one to Matrix. They can pay Clapp directly the $202,000.00 whatever dollars. The balance of the money then to the escrow company at interest pending further Order of the Court.

[36] The rest of the property can be transferred by Order then, and then you can take your appeals one last time and see what the Supreme Court wants to do, but then we'll have done what we can here.

MR. GARAAS: And the Court Reporter, Your Honor?

THE COURT: Um. I don't even – do you anticipate making a record on anything because it's just going to be a closing under these terms unless there is some problem, the Court didn't even plan on being present so. The title company is going to be here. The Clapp family is going to be here or the trust company is going to be here. The deeds are going to be drawn on tract one. I [sic] assuming now an Order as to all the property, and the money will be here. The title company will take it. What would we need a record on that we saw the money?

MR. GARAAS: The entire procedure, Your Honor. I was noticed a hearing for a closing that was going to be conducted, and the Court is being asked to oversee a closing which exceeds jurisdiction and all those other comments that I made. Now I hear that the Court wasn't even going to be here. I don't know of anything in the Option to Purchase that provides for that kind of a closing

under any circumstances. Where did the Court – Where did Mr. Spaeth and Mr. Bueide have the authority to direct that the Option to Purchase be modified in such a respect?

[37] THE COURT: Anything else?

MR. SPAETH: No, Your Honor.

THE COURT: The Court is in recess.

STATE OF NORTH DAKOTA
COUNTY OF CASS

IN DISTRICT COURT
EAST CENTRAL
JUDICIAL DISTRICT

Matrix Properties Corporation, formerly known as E.W. Wylie Corporation, a Minnesota corporation,

Plaintiff,

vs.

TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota,

Defendants.

Civil No. 99-02045

Court Overseen Closing

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE FRANK L. RACEK
– DISTRICT JUDGE –

Cass County Courthouse
Fargo, North Dakota 58103
January 5, 2001

* * *

[12] You do not have the jurisdiction or the right to alter our contractual terms. And the enforcement of the judgment is both of us have the right to enforce it.

We can walk away from them because they already had gone into default. They had already terminated the Option to Purchase by nonpurchase according to the terms of the Option to Purchase on June 1, the year 2000, the full 40 acres of land. They have no – you have no right to

change that Option to Purchase. You have no right to order it, and if you're relying upon a directive coming back saying that it can be enforced, that never said order to transfer. And there has never been an order to transfer, Your Honor. There has never been an order to [13] transfer in the final judgment, and this Court has never had the authority or the right to alter the terms of the final judgment. It was remanded back for only one purpose. Assessment of the costs. It was not remanded back for any reconsideration of the earlier decision of Judge Erickson that merely says the Option to Purchase is still in effect. But that doesn't mean it didn't go into default on the later February 28th and it didn't terminate on June 1, 2000, because they didn't do what they were supposed to do.

THE COURT: Mr. Spaeth.

MR. SPAETH: We have the money here, Your Honor.

THE COURT: Let's see it.

MR. SPAETH: I'm sorry.

THE COURT: Let's see it.

MR. BUEIDE: Your Honor, the money is in the form of some checks which we will have issued in amounts consistent with the amounts set forth in the proposed order. If you want to go through on a tract by tract basis we can cut the checks individually. If you'd like the checks cut collectively beforehand, we can do that as well.

THE COURT: Okay. So what do you have here?

MR. SPAETH: Just blank checks, Your Honor.

* * *

[14] MR. GARAAS: Your Honor, are we having some kind of an evidentiary proceeding at this time?

[15] THE COURT: No, we're tendering the money.

MR. GARAAS: Who's tendering the money?

THE COURT: Mr. Garaas, some of your comments are rather disappointing to the Court here. You as a lawyer know that Mr. Spaeth's client is attempting to give you eight hundred and some thousand dollars for this land. So I don't think there's any question as to who is tendering the money.

MR. GARAAS: Your Honor, I don't know who's tendering the money because this doesn't identify whose money it is. I don't know why we're having evidence being introduced in a proceeding because I've never gotten a signed order that identifies that, the legitimacy of this hearing. I don't know why we're here in terms of this Court exercising any jurisdiction over us or these matters in any way, shape or form, and when we've asked nobody tells us, Your Honor.

So I would like to know on what basis is Plaintiff's Exhibit No. 1 being offered. Is it – is it evidence? Are we having an evidentiary hearing? Because if it is it's the first time we've been able to have an evidentiary hearing and this is the first time that they've introduced any evidence since November 2, 1999, except for attorney's affidavits which aren't proper evidence.

[16] MR. BUEIDE: May I approach, Your Honor.

MR. GARAAS: I might also add, Your Honor, that that sum that's identified on that exhibit is not

enough even under anyone's scenario as to the appropriate amount of – of financing.

* * *

[17] MR. GARAAS: Your Honor, if I may be heard.

THE COURT: Yes.

MR. GARAAS: Your Honor, at four o'clock yesterday afternoon I received an unsolicited hand delivered proposed order from the Vogel law firm. It indicated that this Court had already had ex parte [18] communications with the Vogel law firm for the proposed order, and I didn't have any participation in that process whatsoever and they had no right to submit a proposed order on an ex parte basis to this Court.

I also found it offensive under the North Dakota rules that it provided for things that were directly contrary to what the Court had directed on the Tuesday hearing which also was as a result of an ex parte communication which I didn't have any knowledge of or even reasoning for. But in – in an effort to try and preserve my client's rights that are being taken away and recognizing full well that I probably am whistling into the wind we tried to put together a proposed order in view of what they were asking to do and also some objections. And I've just filed that with the clerk and I've given a copy to Mr. Spaeth which the Court can do with as it please because we don't want to do anything in terms of providing it to the Court when the rules don't provide for that to happen in the fashion that they are proposing it take place. It's one more example of why we find it offensive that due process of law is not being followed in this case, Your Honor.

THE COURT: The Court's not aware of any ex parte communications in this case, Mr. Garaas. So –

MR. GARAAS: I have copies of that, Your Honor, [19] if you would like me to provide you them because they gave me copies of what they gave you. If you got a copy of this proposed order, that was an ex parte communication. That was not pursuant to the directive of this Court and in fact, it's a direct contradiction of the terms that you set forth on Tuesday as to the circumstances of a proposed closing which you indicated you didn't plan on attending.

* * *

[22] MR. GARAAS: Which Court order are you talking about, Your Honor?

THE COURT: The order to convey it's property.

MR. GARAAS: Which one was that, Your Honor?

THE COURT: The one they just made.

MR. GARAAS: At this point in time?

THE COURT: Yes.

MR. GARAAS: On what legal basis, Your Honor?

THE COURT: Enough. Sit. Enough.

MR. GARAAS: On what legal basis? I only ask that this Court identify on what legal basis it acts, because my client has a right to know. My client has a right to due process of law, Your Honor.

THE COURT: Proceed.

MR. GARAAS: You will not answer my question, Your Honor?

THE COURT: Mr. Garaas, I've already put on the record that we're proceeding pursuant to the Supreme Court's directive of December 12th.

MR. GARAAS: And how does the Court get around the fact that it isn't a final Supreme Court order and the mandate has not been returned to you and jurisdiction still is at the Supreme Court, Your Honor? How can this Court act in derogation of it's duties to honor the fact that jurisdiction is now at the Supreme Court level not [23] back here. This Court can't act, Your Honor, on the basis of the December 12, 19 – of the year 2000 decision of the Supreme Court. How can the Court act when it doesn't have jurisdiction based upon that order, Your Honor? My client would like to know.

THE COURT: The Court's been directed by the Supreme Court to proceed. The Supreme Court directs the District Court what to do. I am proceeding under that directive.

MR. GARAAS: Is there a directive that's different than the December 12, 2000, order, Your Honor? Has there been direct communication between the Supreme Court and this Court that is not of record and not reported on December 12th. Because there is no such directive other than the December 12th and that's not a final order. Is there a directive from the Supreme Court to this Court to proceed today that is not placed of record, Your Honor? Have you had telephone conversations with any member of the Supreme Court?

THE COURT: Mr. Garaas, of course not. But this now is getting to be ridiculous. You've tried these arguments now in front of eight different judges, five in

the Supreme Court, Judge Erickson, this Court, Judge Webb. It's over now so we're gonna proceed. Go ahead.

MR. GARAAS: Has there been communications with [24] any representative of the Supreme Court of North Dakota?

THE COURT: Sit down now, Mr. Garaas. Proceed.

MR. GARAAS: May I – my client and I would like to know, Your Honor.

THE COURT: Mr. Garaas, this is the last time now before I ask you to be removed from the Court. We're gonna proceed with the hearing. Your partner will have to sit in your place. But this is beyond any appropriate measure of conduct for an attorney.

MR. GARAAS: I merely wanted to know what jurisdiction the Court was exercising, Your Honor.

THE COURT: Proceed.

MR. BUEIDE: All right, Your Honor. Let's start as to tract one. The footnote one at the proposed order sets out the purchase price for tract one under the terms of the – what is referred to as the Option to Purchase. That being the agreement primarily between Matrix and TAG. The total amount due then for tract by Matrix to TAG is $332 – or $332,900. Tract one the present subject to an underlying option between TAG and the Clapp Land Trust, and the purchase price that TAG is obligated to pay the Clapp Trust to acquire an interest in that property is $202,872.

So we would propose, Your Honor, that – that Matrix pays to the Clapp Land Trust $202,872 and that –

* * *

[33] MR. GARAAS: As a factual matter and as a legal matter, Your Honor, TAG Investments has never exercised it's option under the terms of the underlying option agreement nor can it be compelled to do so. If this Court were to order the exercise of that underlying option to purchase, you would in fact be interfering with the contractual relationship between the Clapp Land Trust and TAG Investments.

The Option to Purchase does not provide for any means by which Matrix can exercise that option to Purchase. There has been no exercise. And under paragraph 13, Your Honor, if they want to accept a deed for that property, they have to accept the deed representing whatever interest TAG Investments had which is zero and still pay the money. I can't imagine why [34] they'd want to do that, but if they want to follow the option of the purchase they're stuck with paragraph 13 of the Option to Purchase. They have to accept whatever title TAG has which is zero.

* * *

[38] MR. GARAAS: We make the same comments that we've earlier made. I would add one specific comment. The Court may find it difficult to accept that I have a duty and a responsibility to assert my client's rights, but in the process of asserting my client's rights that does not come close to the contempt that I feel for the actions of Matrix and their attorneys at this point in time talking about Carol Grettum. Because I happened to have been personally present at two times when this Court said you weren't going to do anything involving Carol Grettum. And on the order that was served upon me – the proposed order that was served upon me at four o'clock last night it

contemplated complete rejection and a total ignoring and disrespect and disregard for your comments before.

It also ignores the legal brief on Defendants concerning lis pendens that's on file with this Court, and they have selectively chosen to quote the statutes [39] that's there because it's really obvious that the lis pendens has in fact been eliminated as of the issuance of the mandate. And that's what that brief relates to, Your Honor. The mandate being issued back and the law of the state of North Dakota, which they seem to ignore, means that there was no pending action which a lis pendens relates to. There was no pending action as of either the 6th or the 7th of June by actions of the North Dakota Supreme Court clerk because that time table then relates back to November 2, 1999, the date of the entry of judgment.

So at the time of the deliver and the recording of the quitclaim deed to Carol Grettum all she was told was take notice of the lawsuit. And Carol Grettum, knowing because her husband told her what was going on, knows that Matrix is on default on February 28th. They had not paid the $17,000 because of the prior years property has to be deeded, with an E-D, and a purchased, with a D at the end of purchase, prior to December 31 of 1999 and they hadn't paid that and they were in default. And then on June 1 of the year 2000 she knows that they didn't accomplish a purchase, with a D at the end, of the additional 20 acres and that the lawsuit became ended on June 7, 19 – of the year 2000 retroactive to November 2, 1999, because of the laws of the state of North Dakota.

[40] Their motion to seek excuse for the 2000 option money payment wasn't brought until seven days later. The lis pendens terminated by law was of no effect. She was

the record title owner at that time. There has been no subsequent lis pendens ever filed to the best of my knowledge and there is no action filed thereafter. The later proceedings are all in excess of jurisdiction and void.

* * *

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF CASS	EAST CENTRAL JUDICIAL DISTRICT

Matrix Properties Corporation, a Minnesota corporation, formerly known as E.W. Wylie Corporation, Plaintiff, vs. TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota, Defendants.	Civil No. 99-2045

TRANSCRIPT OF HEARING

(Motion of Defendants TAG Investments and James A. Grettum to Deposit Funds, and Motion of Defendants to Vacate the Order of January 5, 2001)

Taken At
Cass County Courthouse
Fargo, North Dakota
February 14, 2001

BEFORE THE HONORABLE GEORGIA DAWSON
– DISTRICT JUDGE –

* * *

[3] THE COURT: The record is open in civil file 99-2045. This action is entitled E. W. Wylie Corporation, plaintiff, versus TAG Investments, defendant.

And Mr. Spaeth appears on behalf of the plaintiff. Mr. Garaas on behalf of the defendant. Court's had a chance to briefly review the files. And I'm sure you are all familiar with that expression, Third on a match, and I guess that's my spot.

The Court has two motions before it. I have reviewed those, and also the response, and the reply. It appears that Mr. Garaas's position is that Judge Racek lacks jurisdiction to modify – not modify, but to – I guess modify Judge Erickson's ruling.

* * *

[7] MR. GARAAS: So the issue of jurisdiction, Your Honor, is that at those – the lack of jurisdiction did in fact face Judge Racek because there was an appeal pending out of the June 26th, Order. There was an appeal pending out of the November 8th, Order – two different appeals. And there was lack of jurisdiction because of the statutory and constitutional limitations that were imposed upon the district court. All of which were ignored by him – issued an order. And what we are doing is asking the Court to correct that error. We have a right to have this matter addressed by the district court. And do not – I would encourage you to not accept the invitation to do nothing because that would be a violation of our right not to face an appeal if in fact Judge Racek is violating the statute, that's clearly he is.

* * *

IN DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA

Matrix Properties Corporation, a Minnesota corporation, formerly known as E. W. Wylie Corporation, Plaintiff, vs. TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota, Defendants.	Cass Co. No. CV-99-02045

TRANSCRIPT OF HEARING

ON APPEAL

Taken At
Cass County Courthouse
Fargo, North Dakota
August 27, 2001

– BEFORE THE HONORABLE GEORGIA DAWSON –
– DISTRICT JUDGE –

* * *

[20] Court having considered all of the above, finds that there is justification for issuing its order. Ordering defendants jointly and [severally] to pay the costs in the amount requested. Pay attorneys' fees in the amount requested and to pay the damages for loss of use in the [21] amount requested.

Anything further before we adjourn?

MR. DAVID GARAAS: Could you identify the legal basis for your order, by statute and rule?

THE COURT: No.

MR. GARAAS: Is that because you are unwilling to do so or there is none?

THE COURT: Well, we'll call it the press of business – whatever you want to call it. I've reviewed all the briefs that are contained in these files and so after having reviewed them and filtered through everything, it appears that that is the appropriate result.

We are adjourned.

MR. GARAAS: Does the Court's record reflect any mandate being issued, Your Honor, on the most recent appeal?

MR. SPAETH: Thank you, Your Honor.

THE COURT: Pardon?

MR. GARAAS: Is there any mandate that has been issued by the North Dakota Supreme Court?

THE COURT: I don't know the answer to that question.

We are adjourned. Thank you.

* * *

IN DISTRICT COURT, COUNTY OF CASS,
STATE OF NORTH DAKOTA.

Matrix Properties Corporation, Plaintiff, vs. JCG Investments, L.L.C.; Anderson and Grettum Investments; R. Allan Rostad; Thomas Richards; and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint, Defendants.	File No. 09-01-C-1052 MOTION FOR SUMMARY JUDGMENT AND MOTION FOR RULE 11 SANCTIONS

TRANSCRIPT

OF

PROCEEDING

Taken at

Cass County Courthouse

Fargo, North Dakota

November 1, 2001

BEFORE THE HONORABLE
CYNTHIA ROTHE-SEEGER

– DISTRICT COURT JUDGE –

* * *

[6] MR. GARAAS: Your Honor, it's with great trepidation and fear that I have to interrupt, but I note that there is nothing in the record to reflect what Mr. Spaeth is saying and it's inaccurate. And I know that this is a long and complicated case, but I don't think that the rules of evidence and the rules of civil procedure are abandoned just because Mr. Spaeth is the attorney on the other side. And he is talking about things that I know are not in this file. And I know they are not in any other file in this Court in this State. And I take exception, Your Honor.

[7] MR. GARAAS: Your Honor, there is nothing in the record to reflect this. There is nothing in this case that is reflecting this.

THE COURT: Mr. Spaeth. Do you want to address his objection?

MR. SPAETH: Well, we could bring affidavits and have a trial on it, Your Honor, but it's just background information. And despite his protestations, he doesn't say anything's not true. That's the bottom line.

The third check wasn't cashed because it –

MR. GARASS: Your Honor, what he is saying –

MR. SPAETH: – didn't contain –

MR. GARAAS: is not true.

THE COURT: Okay, excuse me, but I am going to overrule your objection. I'll give you an opportunity to respond. Go ahead, Mr. Spaeth.

MR. SPAETH: The third check wasn't cashed. That's the one at issue for 254,000 because Carol Grettum didn't sign it. Wasn't endorsed by Carol Grettum. That

was in July. They made no further attempt to cash any of these checks.

In September, Judge Dawson entered judgment against James Grettum and TAG Investments for damages, costs and attorney's fees in a little over – almost $189,000. On September 26th and thereafter, Matrix stopped payment on that third check and then filed a motion with – concurrently filing [8] a motion with Judge Dawson to offset the two judgments. And also writing to Mr. Garaas stating that they would furnish them a check for the difference, the 60,000 or so, whatever it was.

The reason I bring this up, Your Honor, it's relevant only because I just wanted to give the Court some perspective when they argue in their brief, they haven't been paid. They were given the checks. They sat on them for ten months and simply refused to cash them. That's what they mean when they said they haven't been paid. It's not that they haven't received the check, they just refuse to cash it.

The reason they did that, I submit, Your Honor, is because they wanted to come to Court today and say we haven't been paid. Well, they have been paid.

The January 5th order of Judge Racek conveying the property provides in relevant part regarding Section – Tract 2b, any and all rights, title and interest of TAG Investments, James A. Grettum or Carol Grettum or anyone claiming by, through or from any of them in and to Tract B is divested in whole and any and all such rights, title and interest are conveyed, transferred, vested and adjudged to be in Matrix Properties Corporation.

The order then went on to explain how the interest of Carol Grettum could be determined, although she was not

a party, in the Court after briefing by both parties, appropriately noted that under Section 28-05-07 of the Century

* * *

[13] MR. GARAAS: Your Honor, upon further reflection and with a great deal of thought put into the subject, I'm not going to rise to the occasion of having to respond to the statements that were in fact made by Mr. Spaeth, that I believe to be untrue, without foundation and not before this Court because I don't think it would be fair to my clients to have to address those on short notice.

I will stand by my proposition and I will reassert that Mr. Spaeth has engaged in presentation of materials that are not true, are not in this record and are not in any other court record. I will also expand upon it in one respect, Your Honor, – two respects. Because Mr. Spaeth has raised the issue of Carol Grettum and in earlier court proceedings he told the Supreme Court that I had no authority nor right to speak for Carol Grettum in the other proceedings. And in those other proceedings before the North Dakota Supreme Court he said it was frivolous for me to assert any right to speak for Carol Grettum. And now he's saying that Carol Grettum is somehow bound by the earlier action.

The second thing I would bring to this Court's attention is because Mr. Brakke is present in this courtroom. Brakke has brought a motion that was recently served upon [14] me in the other action that says that since November 20th of 1999, and I use that term November 20th with reason. I don't know if it's typographical error, but he says that since November 20th of 1999, my clients have had a monetary judgment – money judgment against Matrix. If that's true, then prejudgment – post judgment interest at the rate of 12 percent would in fact have been

due since November 20th, if that's the date of their judgment because I don't know anything about a proceeding happening on November 20th. But if it's a typographical error and it was November 2, 1999, there's 12 percent interest that is due and owing, recognized by the Vogel Law Firm on behalf of Matrix, since November 2, 1999.

And I will tell you that in the earlier proceedings, we have never ever been told that we were entitled to interest from November 2nd. In fact, we were told just the opposite. Mr. Spaeth got up and said, we were not entitled to interest. And as of a few days ago, we got served papers recognizing that we were entitled to interest on a money judgment from November 20th or November 2, 1999. We have not been paid.

And that goes back to the issue of whether or not being paid because there is nothing in the contract, there is nothing in the Supreme Court order of December 12th and there is nothing in the judgment of Judge Erickson that says that we have to accept their check. And there's nothing that says that we have to accept a check that's got more than one signature on [15] it. And there's nothing in there that says that we have to accept anything less than full payment.

And in fact, we have always been willing to bind ourselves, as we have been bound since October of 1996, to the terms of the option to purchase dated October 14, 1996. We have always said we will adhere to that standard because that was the standard that was imposed upon us. And contrary to their assertions, the January 5th of the year 2001 order is not a judgment. An order is not a judgment. That's an elementary principle of law. But in this case it's even doubly important because that order is

not the result of any factual hearing. In fact, Judge Racek absolutely forbid the hearing or presentation of any facts post November 2, 1999. He was only enforcing, he believed, a judgment dated November 2, 1999.

The December 12th decision of the Supreme Court, which wasn't final as of January 5th of the year 2001, it was still subject to a petition for rehearing, didn't change anything, except it recognized that we hadn't been paid yet. As of December 12 of the year 2000, we had no obligation to convey under the option to purchase until they tender payment. To this very day, they have never tendered payment in full. They have tendered some checks, which we had no obligation to accept. They have tendered some checks which are bearing names on it that shouldn't be there. If they were going to tender – by the way, Your Honor, we have never refused to convey. We [16] have never refused to convey. We never got to that point, Your Honor. We never got to that point.

On July 1, 1999, there was a letter that was sent that said we assert our right under the option to purchase. It was repeated by a follow-up letter of July 2, 1999. Before we had any affirmative obligations under the option to purchase, before we had done anything, they brought their lawsuit. He told you that they brought their lawsuit after we refused to convey. We have never refused to convey. They brought their lawsuit first.

It was in the nature of a declaratory action, but it resulted in a judgment for specific performance according to the terms of the option to purchase dated October 14, 1996. The Supreme Court has modified it, I'll call it modification, on December 12th by saying and if they ever get around to tendering payment, we have to convey. But

it would be to convey whatever interest we had on the day that they started their lawsuit.

Your Honor, on this particular case, they're telling you some things that have no relevance to this Court. This Court is acting in an equitable action. A quiet title action is an equitable action. It is not a legal action. It is a distinction that is of significance in this case because an equity – in order to do equity, this Court must also look to the Plaintiff who brought the action and ask if they have done [17] equity. Are their hands clean? One of the things that the Court looks at, you can look at the heading on this case. This case does not reference TAG Investments. This case does not reference Carol Grettum. This case does not reference James Grettum in its caption.

When you look at the summons and complaint that was brought in this action, they apparently have to fit under the unknown parties. Now I don't know what definition of the word unknown parties they have when they started this action, but when you have a title opinion that is part of this record because it's in there in two affidavits. A title opinion from the same law firm, Mr. Beity (phonetic) of that same law firm representing the same client, and he gives a title opinion that says that the legal title to this property is in James Grettum, the predecessor in title to Carol Grettum, and in TAG Investments for the south acreage there. It's approximately 31 acres of land, south 1,030 feet I believe it is. At that time, they can't be unknown parties. Their hands aren't clean. Their hands aren't clean, Your Honor, in the sense that they haven't paid. There is an uncontroverted affidavit that we have not received full tender. Uncontroverted affidavit that we have not been paid. They didn't even dare come forth and tell you in sworn statements that they have paid

in full. Because in the process in the last couple of weeks, the last couple of days, they've had to give another motion recognizing [18] the existence of a money judgment. And by law, the clerk has to assign that percentage of interest, 12 percent. It has nothing to do with the paperwork. Nothing to do with the parties. The clerk has to do that 12 percent post judgment money damage award. And they're now recognizing that they have an obligation to pay it. And we didn't receive it. And nothing in Judge Racek's order, not a judgment, would comply.

In terms of the jurisdictional differences, this Court is ultimately going to be led, and I believe in our brief we pointed out, that if they can't establish their absolute legal title, this Court has only one action before it. And that is to dismiss this action with prejudice until they establish full payment. That is the North Dakota case that we've cited. It's backed up by cases from other jurisdictions that this Court cannot do in an equity action that which is required to be done in a legal action. If they do not establish their clear and unambiguous legal title to this land, this Court cannot use this vehicle to establish it in the absence of a statute allowing it. And this statute, in the State of North Dakota, doesn't allow it, Your Honor. We've cited. They don't dare come back. They can't come up with any law to get around the clear unambiguous language of the statute that says they don't have the right to pursue a quiet title action because they don't have the legal title.

They may have an equitable title to the extent that [19] they've made payment, but they do not have the legal title and they can't achieve legal title whatsoever until it's been done.

THE COURT: I'm sorry to interrupt you, but I'm running out of time and I have more hearings. So can you just give me your conclusions and I'll let Mr. Johnson also speak for a moment.

MR. GARAAS: Your Honor, our brief will set forth the entire contents of our argument. This Court should in fact dismiss this case. As a result, we have lack of frivolity in our pleadings. We are not subject to sanctions. They should never have brought this action and they should never have brought the action until they had legal title. North Dakota law is clear that even the order could not be recorded, Your Honor. The order of Judge Racek is not falling within the confines of 47-19, the chapter entitled record title. 47-19-02 clearly establishes that what has to exist for a record title recording of an order – for a judgment. It didn't exist. That order was never suppose to be recorded. North Dakota law – Justice VandeWalle has read – has said that if the judgment does not contain the legal description, it can never operate as a vehicle by means of conveying title. They don't have the necessary legal or factual basis for acting and we would ask that this case be dismissed. And the frivo – the motion for sanctions be dismissed, Your Honor.

[20] THE COURT: Mr. Johnson.

MR. JOHNSON: Your Honor, I appear for Carol Grettum separately. I think that during the course of these extended proceedings, her specific interests and participation may not have been separately considered up to this point. I just quickly note a correction on Page 5 of our brief. Our reference to the order of August 27th. That order is still on appeal to the Supreme Court as I understand it. I was appreciative of Mr. Spaeth's reference to the

present status of payment in this matter in that the check is apparently stop payment and there's a pending new motion to offset the payment against an existing obligation to which Carol Grettum is not a party. So I have a lot of difficulty appreciating the argument that in fact payment has been made and accepted in this particular case.

Carol Grettum is of course not been a named party to any of these previous proceedings. And I think the Court appreciates the fact that you're married to a Defendant does not necessarily include you as part of the proceedings in any particular case. She first became involved when James Grettum executed a deed in January of 2000 to her and that deed was recorded in May of 2000. And immediately previous to that, Mr. Beity had confirmed that James Grettum was a sole title holder with respect to the parcel being conveyed. So presumably, under the state of the record, Carol Grettum would be the [21] record title holder in respect to this property.

Now Judge Racek's order on January 5, 2001, essentially he indicated the interests of TAG Investments, James Grettum and Carol Grettum were divested. And he concluded that with respect to Carol, her interest was subject to a file notice of lis pendens. So why does Carol still have a claim to this property? First of all, I would submit that either doctrines of res judicata or collateral estoppel only apply if a person is a party to previous proceedings and Carol has never been a named party. She's had no appearance in any of these proceedings and she has not had an opportunity to be heard with respect to her interests.

Also, the order itself was never, I would submit, effective as a means of divesting title. The rules of the civil

procedure and the decisions of the Court all indicate that a judgment is necessary in order to transfer title. I would just refer the Court to the North Dakota Title Standards, Page – Pg 22, indicating that the judgment is sufficient to vest title in a party if the judgment contains the following information, legal description of the property, and the judgment must divest title of one party to the divorce invested in another. The title standards also note that in the event the judgment vests in the Plaintiff, the Defendant's interest – then personal jurisdiction over the Defendant is necessary. And the judgment in effect, must indicate that the Defendant [22] has appeared after having been served personally. And such appearance was based on an agreement in which the vesting of the property in question was agreed to or the Defendant appeared personally at the hearing at which the judgment was ordered.

So – I mean, this is just a little background in terms of what is necessary and appropriate to divest legal title and divest all of the interest of a particular Defendant and Carol Grettum in this case. Obviously, she has not been paid. Now there is a check issued, which has now been revoked as I understand it. And as long as she hasn't been paid, she should retain a vendor's lien in the property.

Matrix now also apparently seeks to divest Carol of her right to payment on these – in these proceedings by offsetting a judgment against the other Defendants against any sums due Carol Grettum.

So we would submit that there is an obvious dispute and contradiction with respect to the divestment of the interest of Carol Grettum in this action. The check itself

obviously was under the control of the other named Defendants in this action so that – we submit that there are a number of issues yet to be determined with respect to Carol Grettum such that – first of all, the motion for sanctions I submit should be denied. Carol Grettum has not been a party to this previous course of proceedings. And secondly, that she has sufficient [23] interest such that the motion for summary judgment with respect to her interest should be denied.

THE COURT: Thank you. Mr. Spaeth, I don't have much time. Do you want to –

MR. SPAETH: Just briefly, Your Honor.

THE COURT: Would you address Mr. Johnson's issues regarding Carol Grettum and not being a part of the previous proceedings, please?

MR. SPAETH: I will, Your Honor.

THE COURT: Thank you.

* * *

IN THE DISTRICT COURT OF
CASS COUNTY, NORTH DAKOTA

Matrix Properties Corporation, formerly known as E.W. Wylie Corporation, a Minnesota corporation,

Plaintiff,

vs.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota,

Defendants.

Civil No. CV-99-02045

DEFENDANTS' BRIEF IN RESISTANCE TO MOTION TO OFFSET JUDGMENTS

(November 19, 2001)

UNDERLYING FACTS AND PROCEDURE

On September 11, 2001, a Judgment was entered by this Court against the above named Defendants in the amount of $188,636.79. The Judgment was entered without an evidentiary hearing, without evidence, without a weighing of evidence, and without legal authority. Neither the above named Plaintiff, nor this Court, could cite a statute, a rule, or case law that allows the post-judgment procedure used by this Court to render a post-judgment judgment or the particular claimed damages or costs awarded by this Court. Defendants have appealed this "imitative" Judgment and are of the belief that such Judgment should be considered void or voidable because this Court violated Defendants' rights to Due Process of Law and Equal Protection of the Law as guaranteed by the Fourteenth Amendment to the Constitution of the United States of America and its counterparts in the Constitution of North Dakota.

Matrix Properties Corporation unilaterally stopped payment upon Matrix Properties Corporation's check made payable to TAG Investments, James A. Grettum, and Carol A. Grettum, dated January 5, 2001, in the amount of $254,830.58 according to the statement of Attorney Spaeth in open court in proceedings before Judge Rothe-Seeger.

In an attempt to have this Court sanction Matrix Properties Corporation's unilateral act of stopping payment of said check, Matrix Properties Corporation has now brought the instant motion, unsupported by any factual affidavit, informing this Court that it should offset a Judgment obtained by Matrix Property Corporation, a Minnesota Corporation, on September 11, 2001, in the amount of $188,636.79 with the monetary judgment obtained by Defendants on November 2, 1999, [erroneously referred to by Matrix as occurring November 20, 1999].

Plaintiff's present Motion claims "facts" without a citation to the record as to the source of the claimed "fact". Other than a citation to N.D.C.C. § 28-20-33, Plaintiff also fails to set forth a legal basis for its position.

Defendants object to granting Plaintiff's Motion for offset. First, Defendants believe it is improper to offset Defendants' November 2, monetary Judgment with the September 11, 2001 void Judgment under N.D.C.C. § 28-20-33. Secondly, even if the September 11, 2001, Judgment is not void, it would be improper and inequitable to offset the judgments until the rights of non-party Carol A. Grettum to payment or property are judicially determined.

Defendants set forth the following underlying facts and case procedure to assist this Court in this motion:

1. On November 2, 1999, Judgment was entered ordering specific performance. The terms of the Judgment provided as follows, to wit:

"In accordance with a Court's Memorandum Opinion on Plaintiff's Motion for [as interpreted by the Supreme Court of North Dakota on December 12, 2000] will continue to draw interest at the rate of 12% per annum pursuant to statute after January 5, 2001. The interest owed on $582,829.09 to the date of this hearing, November 21, 2001, is approximately $61,318.40 for a total principal and interest owing as of November 21, 2001, of at least $644,147.49 [$582,829.09 + $61,318.40 = $644,147.49].

Nothing within the Order of January 5, 2001, affirmed by the Supreme Court, is inconsistent with TAG Investments' position herein: (1) that interest is payable to TAG Investments, and (2) that the TAG Investments is entitled to said principal amounts. There is nothing within the Order of January 5, 2001, or the Supreme Court of North Dakota's decision affirming it, that suggests that TAG Investments was fully paid by the amounts remitted to it, by check [a check is a conditional payment under N.D.C.C. §§ 41-02-59 and 41-03-36] on January 5, 2001.

As the points of law below reveal, TAG Investments looks only to the actual words used by the Supreme Court of North Dakota, and its silence as to interest due TAG Investments. The Supreme Court of North Dakota's silence affirmatively establishes that TAG Investments is entitled to be paid the principal amount of the Judgment, as set forth above, together with statutory interest as a matter of law. It is TAG Investment's belief that its appeal from the January 5, 2001, Order was deemed frivolous solely because the Supreme Court of North Dakota had

given TAG Investments the above relief in the prior appeal on December 12, 2000 (recognition of a judgment amount for the purchase price which will automatically result in judgment interest pursuant to statute).

LAW AND ARGUMENT

Point 1. This Court should not offset a valid judgment with a void judgment.

N.D.C.C. § 28-20-33 is inapplicable in that it presupposes the September 11, 2001, Judgment is a valid judgment. The Judgment of September 11, 2001, was issued by this Court under a novel procedure wherein the Court refused to consider the only facts submitted to it, failed to make findings of fact, and failed to set forth its conclusions of law as required under Rule 52 of the North Dakota Rules of Civil Procedure. Said Judgment gave relief not even requested in Matrix's Complaint. The Judgment of September 11, 2001, trails a November 2, 1999, Judgment even though there can only be one judgment arising from one lawsuit. See Rule 54(b) of the North Dakota Rules of Civil Procedure. There is absolutely no authority in law, or by court rule, that authorizes the Judgment of September 11, 2001. It has been determined that the Fourteenth Amendment's Due Process Clause prevents the denial to litigants of established adjudicatory procedure. *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971); *Logan v. Zimmerman Brush Co., et al.*, 455 U.S. 422 (1982).

The Judgment of September 11, 2001, should be considered void or voidable, as a matter of law, and should not be used as an offset upon a legitimate monetary Judgment of November 2, 1999, in favor of TAG Investments that

bears interest at the rate of 12% per annum as affirmed by the Supreme Court of North Dakota.

Point 2. As a matter of law, TAG Investments is entitled to interest on the monetary amounts awarded it in the November 2, 1999, Judgment.

TAG Investments is entitled to the principal amount owing together with the accruing judgment interest at the rate of 12% since November 2, 1999. The statutory authority for TAG Investments' claim to interest on its November 2, 1999, Judgment is N.D.C.C. § 28-20-34.

One of the problems concerning Plaintiff's Motion is that it claims that the only amount due

* * *

> judgment in part is made up of interest. The same rule applies to a decree in equity.' In *Hobbs v. Cunningham*, 273 Mass. 529, at page 536, it was said, 'It is unnecessary in opinion or rescript to insert any reference to interest. Interest follows on the principal up to the date of decree after rescript from simple affirmance of the decree. The same rule applies in equity as at law.' *Boyer v. Bowles*, 316 Mass. 90, 95. *New England Factors, Inc. v. Genstil*, 322 Mass. 36, 46."

The Judgment of November 2, 1999, as revisited and modified on December 12, 2000, establishes that Matrix Property Corporation already had equitable title (at least to the extent of any payment) since the date of the Judgment. Therefore, it not only appears that the Order of January 5, 2001, did not create equitable title, as the Judgment of November 2, 1999, created title, but the Supreme Court of North Dakota so held by invoking

N.D.App.R 35.1(a)(7). The Order of January 5, 2001, in the eyes of the Supreme Court of North Dakota, merely affirmed the December 12, 2001, interpretation or modification of the November 2,1999 Judgment.

Since full payment has not been made to TAG Investments [or James A. Grettum] the Defendants need not convey as of this date. There is nothing within the January 5, 2001, Order that required TAG Investments to convey so it cannot be said that said Order changed the Judgment. There is nothing within the January 5, 2001, Order that says that TAG Investments and Grettum have been fully paid and thus, again, said Order does not change, nor can it, the Judgment. This is the only interpretation that would be consistent with the rights of TAG Investments and James A. Grettum[6] as expressed in the Option to Purchase.

Point 3. It would be inequitable to offset judgments while Carol A. Grettum's right to property or payment has not been determined.

Without issue, TAG Investments is the owner of a monetary judgment against Matrix Properties Corporation. Without issue, Matrix Properties Corporation has also stopped payment on the only check that has Carol A. Grettum's name upon it. Carol A. Grettum has not been paid to this date for land that she owns. Any court that

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[6] Even though such interpretation would render the "time of the essence" clause, and the requirement of a closing within 45 days, as complete nullities. TAG Investments reserves all rights, contractual, legal or equitable.

says otherwise is not dealing with the factual situation that exists in the real world. Matrix's claimed right to set-off should be denied until, at the earliest, Carol A. Grettum's right to her legal title or, alternatively, payment for her land is recognized and secured to her.[7] [8]

Before there can be an equitable offset of judgments, mutuality is essential. As stated by *Harrison v. Adams*, 128 P.2d 9, 10 (Cal. 1942): "And mutuality is essential, that is the judgments must be between the same parties in the same right." Here, a third party, who has legal title which differs from the legal rights of Defendants herein, has not been paid for her land. Even Matrix must know that no Court can take away land from a legal owner without adequate compensation to the legal owner without violating the Fourteenth Amendment to the Constitution of the United States of America [and comparable provisions in the North Dakota constitution and statutes]. Because of Carol A. Grettum's interest in the land, the parties are different and the rights are different. Mutuality does not exist and therefore, if this Court orders an offset of judgments without adequate protection to Carol

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[7] Under N.D.C.C. § 41-03-36(2)(c) Carol A. Grettum should be entitled to enforce the dishonored check or the underlying obligation (her right to real property) – at her option.

[8] Matrix's obligation of payment to Carol A. Grettum stems from its obligation to pay for her ownership of the land [provided Carol A. Grettum is interested in selling her real property] and it must accept TAG's title [which does not exist and has never existed as of this date] without further obligation on the part of TAG Investments. See Paragraph 13 of the Option to Purchase. Any payment to Carol A. Grettum can never be credited to Matrix's obligations under the monetary judgment for TAG Investments not receiving any monies by such payment.

A. Grettum or payment to her in an amount acceptable to her for her legal title, it must recognize that Carol A. Grettum has continuing rights as the legal owner.

North Dakota also requires mutuality (of at least parties) before there is a right to offset judgments. See *Patterson v. Ward*, 76 N.W. 1046 (N.D. 1898).

Point 4. Assertions of fact made by Attorney Jon Brakke have no factual support.

Attorney, Jon Brakke, without evidentiary support, writes:

> "Subsequent to entry of this Court's November 20, 1999, Judgment, Plaintiff advised Defendants it was prepared to make payment to Defendants. However, Defendants refused to proceed to close on sale of the involved property."

There has never been a refusal by TAG Investments, or James A. Grettum, to proceed to close under the terms of the Option to Purchase or even the Judgment of November 2, 1999, as revisited by the Supreme Court on December 12, 2000. However, as the record of this case clearly reveals, TAG Investments and James A. Grettum have always refused to accept Plaintiff's counter offers. Defendants have never said they would not comply with the terms of the Judgment of November 2, 1999 – even as interpreted and modified by the Supreme Court of North Dakota on December 12, 2000. A need for conveyance has never arisen because Plaintiff has never offered to tender the full purchase price, and pay interest to such date. Other attempted closings proposed by Matrix have required duties never assumed by TAG Investments or James A. Grettum, which included the conveyance of property not owned by

them, excessive tax prorations, and payment of extra expenses. The Supreme Court has clearly said that TAG Investments and Grettum have no duty to convey until tender of payment. Relying upon their rights, as expressed by the Supreme Court of North Dakota, is not a refusal to convey. Matrix Properties Corporations must remit the full principal, and statutory interest, due TAG Investments and Grettum before there is any duty to convey.

* * *

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Matrix Properties Corporation, formerly known as E. W. Wylie Corporation, a Minnesota Corporation,

Plaintiff-Appellee

vs.

TAG Investments, a North Dakota Partnership, and James A. Grettum, an individual resident of North Dakota,

Defendants-Appellants

Supreme Court No.

Cass Co. No. CV-99-02045

BRIEF IN SUPPORT OF DEFENDANTS-APPELLANTS' APPLICATION FOR SUPERVISORY WRIT

APPEAL AND APPLICATION FOR A SUPERVISORY WRIT IN REFERENCE TO AN ORDER DATED JUNE 26, 2000, WHEREIN THE DISTRICT COURT GRANTED DECLARATORY RELIEF TO MATRIX PROPERTIES CORPORATION ON A CONTRACTUAL MATTER

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ISSUES PRESENTED

1. Did the District Court of Cass County, North Dakota, have jurisdiction over the subject matter and parties when it issued its Order of June 26, 2000?

2. Did the District Court of Cass County, North Dakota, provide Defendants-Appellants with due process of law when it issued its Order of June 26, 2000?

STATEMENT OF CASE

The issues raised in this proceeding trail the Supreme Court of North Dakota's decision in *Matrix Properties Corporation vs. TAG Investments,* 2000 ND 88, 609 NW2d 737.[1] On Friday, June 2, 2000, attorney Daniel Bueide of the Vogel Law Firm sent to the Garass Law Firm a letter received on Monday, June 5, 2000, which, among other matters, scheduled a real estate closing for June 21, 2000,

[1] See Appendix pages 44 though 52 for a copy of said decision.

at 1:30 p.m.[2] On June 6, 2000, TAG Investments, through its general partner James A. Grettum, wrote a letter directly to Matrix Properties Corporation indicating, among other matters, that Matrix Properties Corporation was ". . . in default of its obligation in payment of option money to TAG Investments."[3] Grettum requested Matrix Properties Corporation identify any legal or factual basis for the actions of Matrix Properties Corporation, through its attorneys, of June 2, 2000.[4] In response to Tag Investment's letter, Matrix Properties Corporation unilaterally cancelled the June 21, 2000, unilaterally scheduled real estate closing and moved the Cass County District Court for an order that it did not owe the option money that had been due on February 28, 2000.[5] In response to Matrix Properties Corporation's motion, TAG Investments, a North Dakota Partnership, and James A. Grettum submitted their objection making seven (7) points generally relating to: (1) the jurisdiction of the District Court over both the subject matter and parties; (2) violations of the North Dakota Rules of Civil Procedure including the shortened time that the motion was noticed without the requisite order shortening the time of notice; and (3) the procedures employed by Matrix Properties Corporation utilizing the District Court claiming that such procedures were inconsistent with the North Dakota Rules of Civil

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[2] Appendix, page 28.

[3] Appendix, page 31.

[4] Appendix, page 32.

[5] Appendix, pages 8 and 9.

Procedure, the due process rights of Tag Investments and James A. Grettum, and the terms of the Option to Purchase.[6]

To make matters worse concerning the shortened time period of notice of the motion, the City of Fargo experienced a natural disaster two days before the scheduled hearing causing an even more abbreviated time for TAG Investments and its attorneys to respond.[7] Matrix Properties Corporation, without any court order setting a shortened period of notice of the hearing on the motion, gave only nine days notice of the motion.[8] Despite the failure to provide Tag Investments and James A. Grettum with adequate time to respond to the motion, objections to jurisdiction, and issues concerning violation of Tag Investments' and Grettum's right to due process of law, the District Court issued an Order of June 26, 2000, which Order significantly adversely affected the substantive rights of both Tag Investments and Grettum.[9] The Order of June 20, 2000, involved factual and legal matters that were never ruled on by the prior judgment of the District Court of Cass County, North Dakota, nor the Supreme Court of North Dakota.[10]

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[6] Appendix, page 33 through page 43.

[7] Appendix, page 54.

[8] Appendix, pages 8 and 9.

[9] Appendix, pages 6 and 7.

[10] The Memorandum Decision of the District Court of Cass County and the Judgment of the District Court of Cass County are set forth as Addendums 1 and 2, respectively.

FACTS

Whether the District Court correctly interpreted the subject Option to Purchase is not before this Court at the present time. This Application for a Supervisory Writ involves the issue of jurisdiction of the lower court to issue the Order dated June 26, 2000, and whether the lower court afforded Tag Investments and James A. Grettum with due process of law.

The facts recited in the decision of the Supreme Court of North Dakota in the case entitled *Matrix Properties Corporation vs. TAG Investments,* 2000 ND 88, 609 NW2d 737, are incorporated by reference herein. The facts set forth in said decision are relevant because said facts formed the basis for the Supreme Court of North Dakota's decision. As this brief will later point out, any factual issue not passed upon by the prior judgment is not subject to the doctrine of *res judicata*.

The motion of Matrix Properties Corporation that led to the Order of June 26, 2000, related primarily to events that occurred *subsequent* to the judgment date of November 2, 1999.[11] All events occurring subsequently to November 2, 1999, were never passed upon by either the District Court of Cass County or the Supreme Court of North Dakota when rendering its decision.

Matrix Properties Corporation's motion did not inform the Defendants-Appellants, nor the lower court, of any procedural rule or statute that could form a basis for its

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[11] See Affidavit of Sidney J. Spaeth, and attachments in the form of Exhibits 3 through 7. Appendix, pages 10, 11, and 19 through 32.

motion seeking declaratory relief on matters *subsequent* to a final judgment.[12] The lower court's Order dated June 26, 2000, does not identify a procedural rule or statute authorizing its action(s).[13]

Matrix Properties Corporation, without first seeking an order authorizing shortened time for notice, afforded Defendant-Appellants with only nine (9) days notice of the time its motion would be heard.[14]

Defendants-Appellants strenuously objected to (1) the shortened time period of the notice of the motion, (2) the jurisdiction over both the parties and subject matter, and (3) the due process violations of Defendants'-Appellants' rights as expressed in the North Dakota Rules of Civil Procedure and applicable law [and also the misrepresentation of facts, circumstances, and terms of the Option to Purchase].[15]

The shortened time period to respond to the Matrix Properties Corporation's motion was particularly egregious in light of a flooding situation occurring in the City of Fargo which had an effect upon the preparation for said motion by Defendants and their attorneys. Two days before the scheduled hearing, the Garaas Law Firm's and Grettum's offices were flooded with five feet of sewage cutting into precious preparation time.[16] The lower court gave declaratory relief to Matrix Properties Corporation

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[12] Appendix, pages 8 and 9.

[13] Appendix, pages 6 and 7.

[14] Appendix, pages 8 and 9.

[15] Appendix, pages 33 through 43.

[16] Appendix, page 54.

despite said corporation's lack of compliance with the North Dakota Rules of Civil Procedure and a request for more time to respond to the motion.[17]

LAW AND ARGUMENT

POINT 1. THE LOWER COURT DID NOT HAVE JURISDICTION TO GIVE MATRIX PROPERTIES CORPORATION, ANY RELIEF.

The Supreme Court of North Dakota, in *Matrix Properties Corporation v. TAG Investments*, 2000 ND 88, 609 NW 2d 737, did not remand this case to the District Court of Cass County for any other purpose other than setting a cost judgment for the appeal. The Supreme Court of North Dakota merely affirmed the Cass County District Court's decision[18] resulting in a November 2, 1999, Judgment[19] ordering Defendants" . . . to specifically perform under the Option To Purchase dated October 14, 1906." In other words, the prior proceedings before the Supreme Court of North Dakota, and earlier before the lower court, were in the nature of a declaratory judgment declaring that the subject Option to Purchase was not terminated by its own terms because of the failure of Matrix Properties Corporation to close on twenty acres on or before June 1, 1999.

The relief given to Matrix Properties Corporation, by the former judgment, and subsequent appeal, was a

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[17] Appendix, pages 36 and 37.

[18] Addendum #1.

[19] Addendum #2.

declaratory judgment consistent with North Dakota Century Code §32-04-02, paragraph 3. The Judgment of November 2, 1999, did not contain an order compelling Defendants-Appellants to close because the facts before the trial court at the time of the summary judgment (as illustrated by the recitation of facts in the Supreme Court's Decision and the District Court's Memorandum Opinion) did not establish Matrix Properties Corporation's right to have a closing compelled by the lower court as of the date of the Judgment. Indeed, when Matrix Properties Corporation first submitted its proposed Judgment to the District Court, it sought an order which would have compelled a ". . . closing on the sale of the Property subject to Plaintiff s option exercises dated July 1, 1999 and July 2, l990" involving a deed from TAG Investments.[20] Matrix Properties Corporation's initial proposed Judgment was rejected by the District Court[21] because the first proposed Judgment exceeded the lower court's order for judgment – the factual circumstances as of November 2, 1999, would not support that form of judgment.

TAG Investments appealed the November 2, 1999, Judgment of the District Court, **BUT DID NOT SEEK A STAY**. More importantly, **MATRIX PROPERTIES CORPORATION DID NOT SEEK A STAY** from the effect of said November 2, 1999, Judgment.

As will more fully discussed in Point 2 of this Brief, a lower court's jurisdiction terminates as to both subject

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[20] Addendum #3 [the Memorandum Opinion referenced in the letter is set forth as Addendum #1, and is not herein duplicated].

[21] Addendum #4.

matter and parties upon an affirmance, without remand, of a judgment by an appellate court. See *Waterhouse v. Iowa District Court for Linn County,* 593 N.W.2d 141, 142 (Iowa 1999).

POINT 2. THE JUDGMENT OF NOVEMBER 2, 1999, IS A FINAL JUDGMENT THAT CANNOT BE AMENDED WITHOUT COMPLIANCE WITH RULE 52, 59 AND/OR 60 OF THE NORTH DAKOTA RULES OF CIVIL PROCEDURE.

Once the Supreme Court of North Dakota has affirmed a lower court's judgment, there is a final judgment – with its finality relating to the date of the original entry. *Geier v. Tjaden,* 84 N.W.2d 582, 583 (N.D. 1957). The judgment entered, in this case, did not litigate all issues between the parties in reference to the subject contract [Option to Purchase]. The litigation between the parties was limited to the effect of certain actions taken as of the June 1, 1999, date established by the Option to Purchase. To that issue, and that issue alone, the matter is final. No other issue in reference to this contract, or the closing, has been litigated to any court.[22] The District Court does not

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[22] However, the lower court has determined, *and Matrix Properties Corporation did not appeal from such decision*, that the Option to Purchase requires "... the closing (the time at which the money is exchanged for the deed) must occur within 45 days following exercise of the option (and up to 125 days if a title problems needs to be resolved)." Addendum #1, page 12. The lower court later notes the timetable for closing, "... the terms of the Option to Purchase which allowed 45 days to close the deal from the date of the exercise of the option." Addendum #1, pages 12-13. The lower court then nails the conclusive effect of a provision within the Option to Purchase:

(Continued on following page)

have jurisdiction to amend the final judgment of November 2, 1999, unless there is a ground for amending the judgment found within the North Dakota Rules of Civil Procedure. As stated in *Cokins v. Frandsen*, 136 N.W.2d 377 (N.D. 1965) in paragraph 3:

> "3. Any order made subsequent to final judgment must be for the purpose of carrying out the provisions of the judgment. Insofar as any such order attempts to modify such judgment, unless made on grounds provided for in the North Dakota Rules of Civil Procedure for amending or correcting a judgment, and unless made within the time provided for such amendment or correction, it is void."

"It can not be disputed in this case that time is of the essence, as the Option to Purchase specifically provides that it is. Paragraph 21 of the Option to Purchase provides:

> **21. TIME OF THE ESSENCE**: The parties expressly agree that time shall be of the essence in the performance of the parties under this agreement."

The lower court reiterated its position, *never appealed from by Matrix Properties Corporation*, (a) "(i)n this case the option agreement sets forth a clear timeline of the contemplated performance." [page 13]; (b) "It appears to the Court that these were the matters for which time was of the essence . . ." [page 14]; (c) "The Option to Purchase clearly states that closing could occur at any time up to 45 days after the exercise of the option . . ." [page 14]; (d) "The optioners made an offer wherein they agreed that the optionees would have forty-five days from the date of exercise of the option to close the transaction." [page 14]; (e) "Having exercised the option, they (E.W. Wylie) were required to close the purchase within 45 days. They closed within 34 days, well within the time allowed for performance" [page 16]; (f) "The executory contract included a term that the transaction must close within 45 days." [page 16]. Pages reference Addendum #1, and the quoted language is not intended to identify all of the lower court's references to the 45 day closing requirement.

In the instant case, the lower court could not render judgment on matters that occur *subsequent* to November 2, 1999 [to do so involves a legal and factual impossibility]. As of November 2, 1999, the lower court could not order TAG Investments to close because the facts were not present before it to establish that such an Order would be appropriate.

Ordering TAG Investments to now close cannot [ ] be done by motion. Similarly, determining [as the Order of June 26, 1999, so determines], that there is a binding executory contract between the parties because of disputed facts that occurred *subsequent* to the November 2, 1999, Judgment is beyond the lower court's jurisdiction.

There is no North Dakota Rule of Civil Procedure that would apply to Matrix Properties Corporation's subject motion, nor has it made any attempt to identify its legal basis for an order. There is no rule of procedure that would allow the District Court to issue declaratory orders affecting substantive rights on contractual matters that are based on facts that occur subsequent to the date of the judgment.

Because Matrix Properties Corporation did not seek a stay, the time deadlines under Rule 52 of the North Dakota Rules of Civil Procedure have not been met in that more than fifteen days have passed since entry of the final judgment. Rule 59 of the North Dakota Rules of Civil Procedure has a similar fifteen days' requirement for a request for a new trial or amendment to judgment, and such time period has passed.

Matrix Properties Corporation's Motion does not set forth any of the grounds found within Rule 60 of the North Dakota Rules of Civil Procedure. Rule 60 N.D.R.Civ.P.

would require the vacation of the judgment or relief from the judgment. Since the Judgment, upon affirmance by the Supreme Court of North Dakota, only relates to the effect of not closing prior to June 1, 1999, Rule 60 N.D.R.Civ.P. cannot be the basis for Matrix Properties Corporation's Motion, nor for the lower court's Order of June 26, 2000.

The instant case illustrates the effect of the absence of a remand for further proceedings by the Supreme Court of North Dakota. As stated by *Waterhouse v. Iowa District Court for Linn County*, 593 N.W.2d 141 (Iowa 1999), at page 142:

> "In the absence of a remand or procedendo directing further proceedings in the trial court, the jurisdiction of the district court terminates both as to the parties and subject matter when a district court judgment has been affirmed. *Franzen v. Deere & Co.*, 409 N.W.2d 672, 674 (Iowa 1987). The district court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, but the district court does not have the authority to revisit and decide differently issues already concluded by that judgment. *Id.*"

In *Franzen v. Deere And Company*, 409 N.W.2d 672, 674 (Iowa 1987), it is noted that ". . . the district court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, (but) the district court does not have authority to revisit and decide differently issues already concluded by that judgment." It is respectfully submitted that the Cass County District Court did not have jurisdiction to expand upon the final judgment or modify it or in any way, shape or form, without compliance with the North Dakota Rules of Civil Procedure. The

contract issues arising out of the Option to Purchase occurring after November 2, 1999, were truly not part of the prior litigation, and should not have been passed upon by the lower court by means of a post-judgment motion.

If Matrix Properties Corporation feels aggrieved by the present factual scenario, a declaratory action determining the rights of the parties as they now exist, is the appropriate remedy – not a post-judgment motion that is not authorized by the North Dakota Rules of Civil Procedure that acts as an amendment to a final judgment.

POINT 3. THE NORTH DAKOTA RULES OF CIVIL PROCEDURE HAVE NOT BEEN FOLLOWED BY THE MATRIX PROPERTIES CORPORATION AND THE DISTRICT COURT HAD NO AUTHORITY TO PROCEED TO HEAR THE MOTION.

Matrix Properties Corporation failed to afford Defendants-Appellants with sufficient time to address the motion. Pursuant to Rule 6(d) of the North Dakota Rules of Civil Procedure:

> "A written motion, other than one which may be heard ex parte, and notice of the motion must be served at least 14 days before the motion may be heard, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application."

There was no order shortening the time for proper notice. To the best knowledge of the undersigned, Matrix Properties Corporation did not make an ex parte application for a reduced length of time for notice. There is nothing within the North Dakota Rules of Civil Procedure that would allow Matrix Properties Corporation to bring a motion

requesting a shortened time for noticing the hearing, and the hearing on the primary motion, before the court at the same time [thereby requiring responsive pleadings to both motions within an abbreviated time period]. The failure to have an order shortening the time for notice means that the time limits of Rule 6(d) should apply. The length of the notice afforded Defendants-Appellants is particularly egregious in light of the massive flooding occurring in Fargo, North Dakota, on June 19-20, 2000. As noted by the Affidavit of James A. Grettum, James A. Grettum's office and his attorneys' offices, as well as his attorneys' homes were flooded with sewer water. Precious time to properly respond to Matrix Properties Corporation's motion had been lost. Shortened notice exasperated Defendants'-Appellants' situation – which was ignored by the lower court.

POINT 4. MATRIX PROPERTIES CORPORATION'S MOTION WAS AN ACTION SEEKING A DECLARATORY JUDGMENT WITHOUT COMPLIANCE WITH APPROPRIATE RULES OR STATUTES.

Rule 57 of the North Dakota Rules of Civil Procedure, governing declaratory judgments, indicates that the procedures of Chapter 32-23 of the North Dakota Century Code shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances of the matter provided in Rules 38 and 39. Under Chapter 32-23 of the North Dakota Century Code and the civil procedure rules, a Summons and Complaint is required before a lower court may provide declaratory judgment. A service of a Summons under Rule 3 N.D.R.Civ.P., a Complaint showing entitlement to relief under Rule 7 N.D.R.Civ.P., the allowance of the defendants' right to

answer under Rule 8 N.D.R.Civ.P., discovery on the part of the defendants under several different rules of procedure, and the potential right to a jury trial on factual issues are all necessary matters inherent in the judicial system heretofore created to provide Defendants-Appellants with due process of law. The lower court's Order of June 26, 2000, was issued without compliance with the due rights of the Defendants-Appellants as expressed in the North Dakota Rules of Civil Procedure.

The lower court did not have the authority to short-circuit the process. While the former judgment may involve the same option contract [Option to Purchase], it did not determine all rights relating to said Option to Purchase. There may be a course of action open to Matrix Properties Corporation if it feels aggrieved by the factual situation presented after November 2, 1999 [or even after it started its original Complaint for Specific Performance on July 9, 1999], but its motion below prompting this proceedings, and the resulting declaratory Order were totally without statutory or procedural basis, and contrary to the due process rights of Defendants-Appellants.

POINT 5. INSTEAD OF BRINGING A POST-JUDGMENT MOTION, MATRIX PROPERTIES CORPORATION SHOULD HAVE STARTED EITHER A DECLARATORY ACTION OR AN ACTION FOR SPECIFIC PERFORMANCE FOR MATTERS THAT OCCURRED POST-JUDGMENT,.

James A. Grettum and TAG Investments are entitled to a proper factual hearing as to all factual matters that occur subsequent to the November 2, 1999, Judgment to determine if Matrix Properties Corporation's actions constituted a counter offer [counter proposal]. Those

matters occurring *subsequent* to the Judgment (and matters not passed upon in the former Judgment) are not controlled by said Judgment, and are not bound by the doctrine of *res judicata* See *Nodland v. Nokota Co,* 314 N.W.2d 89 (ND 1981). In order for any issue to be considered precluded by the doctrine of *res judicata*, it is not enough that such issue was involved in an earlier action, but must have been actually litigated and decided in such action. See *Matter of Nelson's Estate*, 281 N.W.2d 245 (ND 1979) and *Dolajak v. State Auto and Casualty Underwriters*, 252 N.W.2d 180 (ND 1977). If it is not certain that the same question was determined in another action in favor of the party relying on the judgment therein as conclusive as to a point in question, the judgment is not *res judicata* on such point in question. *Knutson v. Ekren*, 5 N.W.2d 74 (ND 1942).

The Supreme Court's judgment, entered in this case on May 30, 2000, reveals the only facts determined, and acts as *res judicata* only as to those facts involving the June 1, 1999, deadline and closing of the twenty acres on June 28, 1999.

Whether Matrix Properties Corporation's notice of the exercise [of] the option in July, 1999, was consistent with the Option to Purchase has not been passed upon by any court to date, and was not part of the relief afforded Matrix Properties Corporation on November 2, 1999.

There are no facts found within the Supreme Court of North Dakota's decision (which is the decision that forms the potential basis for a *res judicata* claim) as to whether the July, 1999, letters to TAG Investments and Grettum constituted a proper exercise of the option that did not

result in a counter offer. Issues relating to Matrix Properties Corporation's July, 1999, notice, and its attempts or lack of attempts to close were not appropriate to Summary Judgment as of November 2, 1999. Facts relating to the July, 1999, notice were not necessary to determine the final judgment that was entered on November 2, 1999, and affirmed by the Supreme Court of North Dakota.

The Judgment of November 2, 1999, should not in any way, shape, or form prevent Grettum and TAG Investments from having the right to a factual hearing concerning the factual issue(s) as to whether Matrix Properties Corporation's efforts to purchase 114 acres from July, 1999, through December 22, 1999, was a counter offer because such efforts were inconsistent with the terms of the subject Option to Purchase. These facts, some being in dispute, were not involved in the former Judgment. Also important, most of those facts arose more than 45 days following the November 2, 1999, Judgment.

Matrix Properties Corporation must initiate either (a) a new action for specific performance, or (b) an action for a declaratory judgment.

The due process rights of both TAG Investments and James A. Grettum would require a factual hearing on the disputed facts that were not passed upon by the former judgment, or those occurring post-judgment.

The District Court's Order of June 26, 2000, which presumes facts that were not passed upon by the prior litigation and that affect substantive rights of the parties, is inconsistent with TAG Investments' and James A. Grettum's right to due process of law.

RELIEF REQUESTED

It is respectfully submitted that this Court should issue a supervisory writ vacating the Order of June 26, 2000, on the grounds that it was issued at a time that the lower court no longer had jurisdiction over the parties or subject matter, and that it is inconsistent with the due process rights of the Defendants-Appellants as expressed in the North Dakota Rules of Civil Procedure.

Dated this 3rd day of July 2000.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Matrix Properties Corporation,
formerly known as
E. W. Wylie Corporation,
a Minnesota Corporation,

Plaintiff-Appellee,

vs.

TAG Investments, a
North Dakota partnership,
and James A. Grettum,
an individual resident
of North Dakota,

Defendants-Appellants.

Supreme Court
No. 20000192

Civil No. CV-99-02045

BRIEF OF DEFENDANTS-APPELLANTS IN AN APPEAL FROM A POST JUDGMENT ORDER DATED JUNE 26, 2000

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* * *

LAW AND ARGUMENT

POINT 1. THE LOWER COURT DID NOT HAVE JURISDICTION TO GIVE MATRIX PROPERTIES CORPORATION, A MINNESOTA CORPORATION, ANY RELIEF.

The Supreme Court of North Dakota, in *Matrix Properties Corporation v. TAG Investments*, 2000 ND 88, 609 NW 2d 737, did not remand this case to the District Court of Cass County for any other purpose than setting a cost judgment for the appeal. The Supreme Court of North Dakota merely affirmed the District Court's Decision which resulted in the November 2, 1999, Judgment ordering Defendants to specifically perform under the Option to Purchase dated October 14, 1996.[26] In other words, the prior proceedings before the Supreme Court of North Dakota, and earlier before the lower court, were in the nature of a declaratory judgment declaring that the subject Option to Purchase was not terminated by its own terms because of the failure of MATRIX to close on twenty acres on or before June 1, 1999.

The relief given to MATRIX, by the former judgment, and appeal, was a declaratory judgment consistent with North Dakota Century Code §32-04-02(3).

The Judgment of November 2, 1999, did not contain an order compelling either TAG Investments or GRETTUM to close because the facts before the trial court at the time of the summary judgment (as illustrated by the recitation of facts in the Supreme Court's Decision and District Court's Memorandum Opinion) did not establish

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[26] Appendix , page 31 and page 84.

Matrix Properties' right to have such a closing compelled by the Court as of the November 2, 1999, Judgment.

Indeed, when MATRIX first submitted its proposed Judgment to the District Court following the decision of the District Court, it sought an order compelling TAG Investments and GRETTUM " . . . proceed to closing on the sale of the Property subject to Plaintiff's option exercises dated July 1, 1999 and July 2, 1999".[27]

MATRIX's initial proposed judgment was rejected by the District Court because the factual circumstances as of November 2, 1999, would not support that form of Judgment, nor was it consistent with the decision of the District Court.

TAG Investments appealed the November 2, 1999, Judgment of the District Court **but did not seek a stay**. More importantly, MATRIX did not seek a stay from the effect of said Judgment.

The Supreme Court of North Dakota affirmed the November 2, 1999, Judgment awarding costs to MATRIX without any remand.[28]

As will be more fully discussed in Point 2 of this Brief, a lower court's jurisdiction terminates as to both subject matter and parties upon an affirmance, without remand, of a judgment by an appellate court. See *Waterhouse v.*

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[27] Addendum to Affidavit of James A. Grettum In Response to Motion for Supervisory Writ, TAB 4(3), and included based upon the invitation to the Supreme Court set forth in Footnote #2, on page 10 of the Affidavit of James A. Grettum.

[28] Appendix, page 84.

Iowa District Court for Linn County, 593 N.W.2d 141, 142 (Iowa 1999).

POINT 2. THE JUDGMENT OF NOVEMBER 2, 1999, IS A FINAL JUDGMENT THAT CANNOT BE AMENDED WITHOUT COMPLIANCE WITH RULES 52, 59 OR 60 OF THE NORTH DAKOTA RULES OF CIVIL PROCEDURE.

The lower court's Order of June 26, 2000, amends the Judgment that was previously affirmed by the Supreme Court of North Dakota, when it declared that MATRIX's ". . . exercise of the Option in July of 1999, created a binding executory contract for the purchase and sale of real property as found by prior court Order."[29]

Neither TAG Investments nor Grettum are aware of any prior court Order that declared that MATRIX's efforts of July 1, 1999, created a binding executory contract.

Nothing within the lower court's Memorandum Opinion, Judgment or even the decision of the Supreme Court of North Dakota establish a binding executory contract for the purchase of the remaining acreage based upon the facts that were presented to the District Court at the time of the motion for summary judgment which resulted in the November 2, 1999, Judgment.

There is no "prior Order" in the docket sheets that TAG Investments or Grettum can find which would support the lower court's statement contained in its Order of June 26, 2000. Because the prior judgment only ordered TAG Investments (and Grettum) to specifically perform

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[29] Appendix, pages 113-114.

the Option to Purchase, and did not order TAG Investments to specifically perform a binding executory contract, such June 26, 2000, Order would act as an amendment of the original Judgment affirmed by the Supreme Court.

Further, the facts of this case, as revealed in the Memorandum Opinion of Judge Erickson, the Judgment dated November 2, 1999, and the Supreme Court of North Dakota's Decision, establish that MATRIX did not perform under the Option to Purchase dated October 14, 1996, as of the date of the Judgment. To this date, MATRIX has not performed, nor tendered performance, and the "prior Order" as envisioned by Judge Racek's June 26, 2000, Order would not have been appropriate.

Once the Supreme Court of North Dakota affirmed the lower court's judgment, there is a final judgment with its finality relating to the date of the original entry. *Geier v. Tjaden*, 84 N.W.2d 582, 583 (N.D. 1957). The November 2, 1999, Judgment entered in this case, did not litigate all issues that might arise between the parties in reference to the subject Option to Purchase. The litigation between the parties, at the invitation of MATRIX by bringing a motion for summary judgment dated August 19, 1999, and filed August 20, 1999,[30] was limited to the effect of the June 1, 1999, date. To that issue, and that issue alone, the matter is final. No other issue in reference to this contract, or the closing, has been litigated to any court. The District Court does not have jurisdiction to amend the final Judgment of November 2, 1999, unless there is a ground for amending the judgment found within the North Dakota Rules of

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[30] Docket Entry # 6.

Civil Procedure. As stated in *Cokins v. Frandsen*, 136 N.W.2d 377 (N.D. 1965) in paragraph 3:

> "3. Any order made subsequent to final judgment must be for the purpose of carrying out the provisions of the judgment. Insofar as any such order attempts to modify such judgment, unless made on grounds provided for in the North Dakota Rules of Civil Procedure for amending or correcting a judgment, and unless made within the time provided for such amendment or correction, it is void."

In the instant case, the lower court could not render judgment on matters that occur subsequent to November 2, 1999. As of November 2, 1999, the lower court could not have ordered TAG Investments to close because the established facts made such an Order inappropriate.[31]

As of June, 2000, ordering TAG Investments to close cannot [ ] be done by motion. Similarly, determining, as the Order of June 26, 1999, determines, that there is a binding executory contract between the parties because of disputed facts that necessarily occur subsequent to the November 2, 1999, judgment is beyond the lower court's jurisdiction.

The North Dakota Rules of Civil Procedure contain no rule that would apply to MATRIX'S subject motion. There is also no rule of procedure that would allow the District Court to issue declaratory orders affecting substantive

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[31] The Affidavit of James A. Grettum in Response to Matrix Properties Corporation's Application for a Supervisory Writ document many of the reasons why the actions of MATRIX are counterproposals and properly rejected by TAG Investments. Supreme Court Docket Entry #20.

rights on contractual matters that are based on facts that occur subsequent to the date of the judgment.

Because MATRIX did not seek a stay, the time deadlines under Rule 52 of the North Dakota Rules of Civil Procedure have not been met in that more than fifteen days have passed since entry of the final judgment.

Rule 59 of the North Dakota Rules of Civil Procedure also has a fifteen days' requirement for a request for a new trial or amendment to judgment – such time has also passed.

MATRIX's motion did not set forth any of the grounds found in Rule 60 of the North Dakota Rules of Civil Procedure for "relief from judgment" – a judgment they sought to uphold and did not appeal. Invoking Rule 60 of the North Dakota Rules of Civil Procedure would result in the alteration, vacation, or setting aside the November 2, 1999, Judgment and the decision of the North Dakota Supreme Court, both of which were supposed to be "final". The undersigned is unaware of any attempt by MATRIX to petition the Supreme Court for rehearing following its decision, nor is the undersigned aware of any attempt to further appeal such decision.

Since the judgment, upon affirmance by the Supreme Court of North Dakota, only relates to the effect of not closing prior to June 1, 1999, Rule 60 of the North Dakota Rules of Civil Procedure clearly cannot be the basis for MATRIX's motion, nor the basis for the lower court's Order of June 26, 2000. Neither MATRIX, nor Judge Racek, ever identify any rule, statute, constitutional provision, or legal doctrine authorizing the lower court to amend the "final" Judgment.

The instant case illustrates the effect of the absence of a remand for further proceedings by the Supreme Court of North Dakota in its judgment. As stated by *Waterhouse v. Iowa District Court for Linn County*, 593 N.W.2d 141 (Iowa 1999) at page 142:

> "In the absence of a remand or procedendo directing further proceedings in the trial court, the jurisdiction of the district court terminates both as to the parties and subject matter when a district court judgment has been affirmed. *Franzen v. Deere & Co.*, 409 N.W.2d 672, 674 (Iowa 1987). The district court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, but the district court does not have the authority to revisit and decide differently issues already concluded by that judgment. *Id.*"

See also, *Franzen v. Deere And Company*, 409 N.W.2d 672, 674 (Iowa 1987). The absence of a remand was purposeful, and MATRIX did not initiate any further appellate review of the appellate decision that did not contain a remand to the lower court for further proceedings.[32]

The District Court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, but the District Court does not have authority to revisit issues already concluded by that judgment, nor

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[32] Rule 40 of the North Dakota Rules of Appellate Procedure authorizes even the ostensible winning party to petition for rehearing if "in the opinion of the petitioner the court has overlooked or misapprehended . . . " points of law or fact. Other rules would have authorized MATRIX to appeal from the November 2, 1999, Judgment – which was never done.

decide different issues that stem from subsequent factual matters. It is respectfully submitted that the District Court did not have jurisdiction to expand upon the final judgment or modify it or in any way, shape or form, without compliance with the North Dakota Rules of Civil Procedure.

Contractual issues arising after November 2, 1999, were truly not part of the prior litigation ending on November 2, 1999 – the date of the Judgment. The issues of fact occurring subsequent to entry of judgment should not have been passed upon by the lower Court by a post-judgment motion. If MATRIX feels aggrieved by the present factual scenario – all of which occurred after the motion for summary judgment and after the Memorandum Opinion and after the Judgment of November 2, 1999, another declaratory action determining the rights of the parties as they now exist, is the appropriate remedy, rather than a post-judgment motion that is not authorized by the Rules of Civil Procedure – particularly when it acts as an amendment to a "final" judgment.

POINT 3. THE NORTH DAKOTA RULES OF CIVIL PROCEDURE WERE NOT FOLLOWED BY MATRIX PROPERTIES CORPORATION AND THE DISTRICT COURT HAD NO AUTHORITY TO HEAR THE MOTION.

MATRIX failed to afford Defendants-Appellants with sufficient time to address its Motion.

Pursuant to Rule 6(d) of the North Dakota Rules of Civil Procedure,

> "A written Motion, other than one which may be heard ex parte, and notice of the motion must be

> served at least 14 days before the motion may be heard, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application."

There was no order shortening the time for notice. MATRIX did not make an ex parte application for a reduced length of time for notice. There is nothing within the North Dakota Rules of Civil Procedure that would allow MATRIX to bring (a) a motion requesting a shortened time for noticing the hearing and (b) the hearing on the motion before the court – at the same time. The failure to have an order shortening the time for notice means that the time limits of Rule 6(d) should have applied – 14 days notice before the hearing.

The length of the notice afforded TAG Investments and Grettum was particularly egregious in light of the massive flooding occurring in Fargo, North Dakota, on June 20, 2000. As noted by the Affidavit of James A. Grettum, GRETTUM's office and his attorneys' offices, as well as his attorneys' homes were flooded.[33] Precious time to properly respond to MATRIX's Motion had been lost. Shortened notice exasperated Defendants-Appellants situation which was ignored by the lower Court. Had there been adequate time to prepare, TAG Investments and Grettum would have submitted an extensive affidavit outlining the actual circumstances after November 2, 1999, in a manner similar to the Affidavit of James A. Grettum In Response to Matrix's Motion for Supervisory

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[33] Appendix, page 96.

Writ with supporting Addendum [consisting of twelve documents].[34]

POINT 4. MATRIX PROPERTIES CORPORATION'S MOTION WAS AN ACTION SEEKING A DECLARATORY JUDGMENT WITHOUT COMPLIANCE WITH APPROPRIATE RULES OR STATUTES.

Rule 57 of the North Dakota Rules of Civil Procedure, governing declaratory judgments, indicates that the procedures of Chapter 32-23 of the North Dakota Century Code shall be in accordance with these rules and the right to trial by jury may be demanded under the circumstances of the matter provided in N.D.R.Civ.P. Rules 38 and 39.

Under Chapter 32-23 of the North Dakota Century Code and the civil procedure rules, a Summons and Complaint is required before a lower court may provide declaratory judgment. A service of a Summons under N.D.R.Civ.P. Rule 3, a Complaint showing entitlement to relief under N.D.R.Civ.P. Rule 7, the allowance of the defendants' right to answer under N.D.R.Civ.P. Rule 8, discovery on the part of the defendants under several rules set forth in the North Dakota Rules of Civil Procedure, and the potential right to a jury trial on factual issues, are all necessary matters to provide TAG Investments and Grettum with due process of law.

The lower Court's Order of June 26, 2000, was issued without compliance with the due process rights of TAG Investments and Grettum as expressed in the North

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[34] Clerk of the Supreme Court Docket Entry #20.

Dakota Rules of Civil Procedure and/or Chapter 32-23 of the North Dakota Century Code. The lower court did not have the authority to short-circuit the process because of the former judgment [that may have involved the same Option to Purchase contract, but did not determine all rights relating to said option contract]. Similarly, the lower court rendering judgment on November 2, 1999, did not have access to all relevant facts, all of which occurred *after* November 2, 1999. The *facts not set forth* in the November 2, 1999, Judgment were also not known to Judge Racek on or before June 26, 2000, because MATRIX did not support its motion with any factual allegations relating to the exercise of the Option to Purchase and full compliance – without deviation – of its terms.

There may be a course of action open to MATRIX if it feels aggrieved by the factual situation arising after November 2, 1999, but its motion below and the resulting declaratory June 26, 2000, Order was totally without (a) statutory or procedural basis, (b) supporting facts, and (c) was issued contrary to the due process rights of TAG Investments and Grettum.

* * *

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Matrix Properties Corporation,
f/k/a E.W. Wylie Corporation,
a Minnesota corporation,

Plaintiff-Appellee,

vs.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota,

Defendants-Appellants.

Supreme Court No. 990336

Civil No. CV-99-02045

PETITION FOR REHEARING

APPEAL FROM A POST JUDGMENT ORDER
DATED JUNE 26, 2000

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* * *

a comprehensive responsive pleading,[12] and additional evidence [Affidavit of James A. Grettum dated January 11, 2000], establishing a rejection of a counter offer.[13] After MATRIX's receipt of the TAG Investments' list of requirements deemed necessary to close as a result of the December 28-29,1999, verbal and written Orders of the Court, MATRIX proposed changes from its own prior proposal for closing[14] – recognizing that its earlier proposal did not comply with the terms of the Option to Purchase. MATRIX's concession is not as profound as the judicial recognition by Judge Erickson *on January 26, 2000*: **"The Court's previous Order that underlies this matter directed the Defendants to specifically perform under the Option to Purchase Contract dated October 14, 1996.**[15] Judge Erickson recognized that further fact-finding proceedings were necessary once the Supreme Court "make(s) a decision as to what they think the effects are and then we'll come back here and sort through whatever is left to sort through."[16] Please also note that MATRIX did not cross-appeal, and the "final judgment" did not require a closing, nor could it have done so, on the basis of the facts that existed on or before the date of the Judgment – November 2, 1999. See, Rule 35 N.D.R.App.P.

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[12] Docket Entry # 61.

[13] Docket Entry # 59.

[14] Docket Entry # 64, pages

[15] Transcript of January 26, 2000, page 3.

[16] Transcript of January 26, 2000, pages 20-21.

2. THE NORTH DAKOTA SUPREME COURT HAS DENIED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAW TO APPELLANTS.

Under the guise of N.D.R.App.P. 35.1(a)(1), the Per Curiam decision[17] "determines . . that no reversible error of law appears and insofar as applicable: (1) the appeal is frivolous and completely without merit. ." In the appellate process, the North Dakota Supreme Court is deciding that TAG Investments and GRETTUM are not entitled to federally protected rights and rights guaranteed to all North Dakota litigants. By so stating, the North Dakota judicial system is not protecting established contractual rights, termination of contractual rights, rights to due process of law, and equal protection of the laws.

These federally rights violated by the Per Curiam decision include, but are not limited to, the following [the full statutory language is set forth in the Addendum endnotes]: (A) 42 U.S.C. § 1981;[1] (B) 42 U.S.C. § 1982;[2] (C) 42 U.S.C. § 1983;[3] (D) 42 U.S.C. § 1985;[4] (E) 42 U.S.C. § 1986;[5] and (F) 42 U.S.C. § 1988(a);[6] and (G) 14th Amendment to the Constitution of the United States requiring individual States, such as North Dakota, to provide Due Process of Law and Equal Protection of the Laws. Simply put, TAG Investments and GRETTUM have been deprived of the federal right to equal protection of the law and due process of law, before a fair and impartial judge who would render a decision based upon submitted evidence, without a judicial taking, and recognition of existing contractual

[17] Matrix Properties Corp. v. TAG Investments, 2000 ND 213, ¶1.

existing contractual rights, all pursuant to federally protected rights.

Among those federally protected rights, TAG Investments reminds the Supreme Court of 42 U.S.C. § 1981, entitled "Equal rights under the law" which includes language recognizing that TAG Investments and GRETTUM have the "same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property . ." Moreover, the term "make and enforce contracts" has special meaning in the context of this case in that it "includes the making, *performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.*" The Option to Purchase was terminated by its own terms on June 1, 2000, and MATRIX was in default as of February 28, 2000. These are but two specific terms of the Option to Purchase that the Per Curiam decision wrongfully abrogates.

Rights guaranteed to North Dakota litigants violated by the Per Curiam decision include, but are not limited to, those rights set forth in it its Brief and hereafter noted: POINT 1 [right to be free from district court amendments while on appeal], POINT 2 [right to due process of law, including notice; right to be free from district court amendments while on appeal, and revisiting of concluded issues thereafter]; POINT 3 [due process of law], POINT 4 [due process of law in virtually every aspect of litigation from beginning to end, and the protections of N.D.C.C. Chapter 32-23 which may include a jury trial, and the right to be free from district court amendments while on appeal, and revisiting of concluded issues thereafter, the right to a

factual hearing], POINT 5 [right to a factual hearing, right to due process of law], POINT 6 [right to the benefit of its contract – see Article I, § 1 of the Constitution of North Dakota and the protections of §§s 9, 13, 21, and 22], POINT 7 [right to the benefit of its contract, and right to the benefit of the "final judgment" identifying time to be of the essence], and POINT 8 [right to the benefit of its contract]

3. THE NORTH DAKOTA SUPREME COURT IS ACTING IN EXCESS OF ITS APPELLATE JURISDICTION.

The North Dakota Supreme Court's jurisdiction is based upon either the Constitution of North Dakota [Article VI, § 2, provides "(t)he supreme court shall be the highest court of the state. It shall have appellate jurisdiction, and shall also have original jurisdiction with authority to issue, hear, and determine such original and remedial writs as may be necessary to properly exercise its jurisdiction. . ."], or statutes [N.D.C.C. § 27-02-04 provides "(t)he supreme court may exercise appellate jurisdiction only, except when otherwise specially provided by law or by the constitution. . ."; and N.D.C.C. § 28-31-09].[18] If the Supreme Court's jurisdiction cannot be conferred upon it by parties, how can the Supreme Court claim to act to amend a "final judgment" resulting from its own prior opinion?

Somehow, without any presented facts or identified legal justification, the North Dakota Supreme Court is now amending its own prior decision. The Supreme Court

[18] *Olson v. Koppy*, 1999 ND 87, 593 N.W.2d 762.

is reminded of a elementary principle of "law of the case" set forth in *In re Estate of Boysen*, 351 N.W.2d 398, 400-401 (Minn. App. 1984):

> "Where a question of law is decided on appeal, it becomes the law of the case, which the trial court is bound to follow on a new trial and the appellate court will not re-examine on a subsequent appeal.
>
> *Nees v. Minneapolis Street Ry. Co.*, 221 Minn. 396, 397-98, 22 N.W.2d 164, 164 (1946) (quoting *State v. Prickett*, 221 Minn. 179, 182, 21 N.W.2d 474, 475 (1946)) . . . The trial court may not vary the mandate of the supreme court or decide issues beyond those remanded. *Halverson v. Village of Deerwood*, 322 N.W.2d 766 (Minn. 1982).
>
> To permit a trial court to disobey in the slightest degree the mandate of [the supreme court] would inevitably disrupt the harmonious operation of our entire judicial system and produce disorganization and incalculable confusion.
>
> *Tankar Gas, Inc. v. Lumbermen's Mut. Cas. Co.*, 215 Minn 265, 271, 9 N.W.2d 754, 758 (1943)."

See also, *Muilenberg v. The Upjohn Co.*, 426 N.W.2d 767, 769 (Mich.App.1988).

These concepts are not unique, even North Dakota has recognized the finality of a mandate from the Supreme Court ["In other words, it was the duty of the trial court to carry out the mandate of this court."]. See, *Colter v. Dill*, 193 N.W. 662, 665 (ND 1923). See also, 5 AmJur 2d, Appellate Review, §s 784 and 787. As to the facts arising after November 2, 1999, there has never been a factual

hearing to determine matters of substance as to MATRIX's obligations on February 28, 2000, or the termination date of June 1, 2000. The June 26, 2000, Order amended the mandate of the Supreme Court without a jurisdictional basis, and without due process of law. TAG Investments and GRETTUM are being treated unequally in this judicial system as to contractual rights and judicial process.

The Per Curiam decision rendered an opinion on an issue that was not before it, and based upon facts that have never been heard in proceedings conducted pursuant to due process of law. As to the issue directly before the Supreme Court, only James A. Grettum supplied evidence according to law and the unchallenged, and uncontroverted, affidavit established non-compliance with the terms of the Option to Purchase causing a default on February 28, 2000, and a termination on June 1, 2000. MATRIX offered no facts showing minute compliance with the Option to Purchase, nor even an attempt to comply within the time periods previously deemed "to be of the essence".

The Per Curiam decision also clearly recognizes that as December 12, 2000, MATRIX had not tendered performance. The effect of such decision is that the North Dakota Supreme Court turns N.D.C.C.§ 32-04-14 on its head by ordering specific performance of a conveyance at a time the Supreme Court of North Dakota, by its own decision, recognizes (1) the conditions precedent for specific performance have not been met and/or (2) failure to compensate TAG Investments for MATRIX's default in not closing within forty-five days of the only notice it has ever given – July 1, 1999, and/or (3) MATRIX's default of not having twenty additional acres "purchased" by June 1,

2000, thereby terminating the Option to Purchase according to its terms. The right to have a termination of contract on its terms is a federally protected right which cannot be taken away by the North Dakota Supreme Court's actions.

Most certainly a conveyance could not have been ordered on November 2, 1999, because MATRIX did not tender performance as of that date [and not even as of December 12, 2000, according to the Supreme Court]. Judge Erickson recognized that a conveyance could not be ordered as of November 2, 1999, because there was no evidence before him which precluded the issuance of the first proffered Judgment. The Supreme Court of North Dakota cannot order a conveyance without evidentiary support and without violating TAG Investments' federal civil rights to contract, provide evidence, equal protection of the laws, and due process of the law.

WHEREFORE, TAG Investments and GRETTUM pray that rehearing be granted and, upon rehearing, address the issues raised on appeal in light of their federally protected rights.

* * *

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Matrix Properties Corporation,
a Minnesota corporation,

Plaintiff-Appellee,

vs.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota,

Defendants-Appellants.

Supreme Court No. 20010060

Civil No. CV-99-02045

BRIEF OF DEFENDANTS-APPELLANTS

APPEAL TO THE ORDER OF THE DISTRICT COURT OF CASS COUNTY DATED NOVEMBER 8, 2000; THE ORDER OF THE DISTRICT COURT OF CASS COUNTY DATED JANUARY 5, 2001; AND THE ORDER OF THE DISTRICT COURT OF CASS COUNTY DATED FEBRUARY 16, 2001, AND ANY AND ALL INTERLOCUTORY ORDERS OR VERBAL ORDERS ISSUED BY THE DISTRICT COURT OF CASS COUNTY, NORTH DAKOTA, IN NOVEMBER AND DECEMBER, 2000, AND JANUARY 2001, WHETHER IN WRITING OR NOT

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* * *

considered together for the purpose of achieving a reasoned and reasonable determination,' . . . ."[51]

The lower court, subsequent to the mandate of the first appeal, did not base its orders that are presently on appeal upon any fact presented to it in any proceeding including the November 7, 2000, January 2, 2000, or January 5, 2001, proceedings. The lower court determined that facts occurring post-judgment were of no concern to the court in determining the post-judgment issues before it. When counsel noted that court proceedings must be based on evidence [with none having been presented by Matrix], the lower court stated on pages 38 and 39 of the transcript of November 7, 2000, proceedings as follows:

"THE COURT: Yeah, but this is no longer a trial. The case has been reduced to a judgment. It's been affirmed on appeal. The Plaintiffs have the right to buy the land that's subject to this contract for 877,000 plus dollars. If they put the cabbage on the table, you convey it. If you can't convey it, then you better come in and show that it's impossible for you to do so, which I haven't heard yet. Or –

MR. GARAAS: And no factual findings, Your Honor?

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[51] *Usry v. Theusch*, 521 N.W.2d 918, 919 (N.D. 1994); *Barta v. Hinds*, 1998 ND 104, 578 N.W.2d 553.

> THE COURT: No, there's no – this is enforcement of the judgment. So the order is appropriate. * * * "

Judge Racek continued to refuse to consider the post-judgment facts submitted by TAG and Grettum when issuing his Order of January 5, 2001.[52] In other words, the November 8, 2000, Order and January 5, 2001, Order were not made by a process wherein the facts of record, and law, are considered together. It was made solely by a judge who felt that he could revisit the judgment and declare, by his interpretation, that the November 2, 1999, Judgment controls events occurring subsequent to November 2, 1999 [while evidencing lack of judicial knowledge and preparation].

This Court's Mandate arising out of this Court's December 12, 2000, decision renders the Judgment of November 2,1999, as being a conditional judgment. A conditional judgment does " ... not become effective unless certain conditions are complied with, or that may be defeated or amended by the performance of a given act or the occurrence of a certain event." Wright, Miller & Kane, Federal Practice and Procedure: Civil 3d § 2651, pages 13 and 14. See also *In re Roney*, 139 F.2d 175 (7th 1943) and *2-H Ranch Co. v. Simmons*, 658 P.2d 68, 72 (Wyo. 1983). TAG and Grettum are entitled, as a matter of due process of law, to have a fact finder consider facts that occur subsequent to the date of November 2, 1999, Judgment to see if the condition failed or was not performed by

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[52] Transcript of Court Overseen Closing page 14, line 24, through page 15, line 1.

Matrix. See *Lancaster v. Simmons*, 621 S.W.2d 935 (Mo. Ct. App. 1981) as an example of showing a court, sitting in equity, and having further fact finding hearings to determine if a party, who was awarded specific performance, had complied with his duties under the interlocutory decree.

To satisfy the due process requirements of the Fourteenth Amendment to the Constitution of the United States of America, and its counterparts in the Constitution of North Dakota, TAG and Grettum should be entitled to an appropriate evidentiary proceeding to determine if Matrix has (a) abandoned the contract presumptively formed upon the issuance of its Complaint and/or (b) forfeited it rights to specific performance.

B) Denial of Equal Protection.

Article 1, §s 9 and 21, of the Constitution of North Dakota and the Fourteenth Amendment to the Constitution of the United States guarantee rights essential to liberty and protection of property – an open court system and due process of law, all part of the declaration of individual rights. See, *Main et. al. v LaMoure County*, 145 N.W. 582, 586 (N.D. 1914); *Bulman v. Hulstrand Construction Co.*, 521 N.W.2d 632, 634 (N.D. 1994).

TAG and Grettum were denied equal protection of the law as well as reasonable access to the courts under Judge Racek's perverted implementation of our judicial system's procedures.

In *Wilson v. Kryger*, 149 N.W. 721 (N.D.1914), citing *Selover B. & Co. v. Walsh*, 226 U.S. 112, 57 L.Ed. 146, 33 S.Ct. 69, this Court recognized that "'the test of equal

protection of law is whether the parties are all treated alike in the same situation.'" Judge Racek did not treat TAG and Grettum as he treated Matrix when it came to his judicial oversight of this case. He also failed to remember the role of the judiciary announced in *Baltimore & Ohio Southwester[n] Railway Company v. Voigt*,176 U.S. 498, 505, 20 S.Ct. 385, 1900 U.S. Lexis 1752, 44 L.Ed. 560 (1900) that "the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts .."

With all of the "outs" [most of which were favorable to Matrix, but acceptable to TAG provided that TAG could reject any counterproposal – the law of this case], Matrix never tendered payment according to the Option to Purchase, a point most assuredly conceded by Matrix to exist on December 12, 2000, when it took no issue with the Supreme Court's determination that tender of payment had not yet occurred.[53]

First, he denied TAG and Grettum any right to assert the existence of contractual terms under the Option to Purchase which would nullify Matrix's claims. Secondly, he refused to accept the only competent evidence submitted – TAG's sworn affidavits, based upon personal knowledge of James A. Grettum, that went unchallenged as to accuracy. TAG's affidavits established that Matrix had **never** fulfilled its contractual obligations under the Option to Purchase. Such unchallenged evidence established the rejection of Matrix's counterproposal in

[53] App. p. 610-611.

December, 1999, for multiple reasons. In addition, Judge Racek personally witnessed further Matrix deviations from the Option to Purchase, properly rejected as counter-proposals on January 5, 2001.[54] Judge Racek's view of the law did not provide equal access to the Court, nor did he render an impartial decision based on evidence and law.[55]

Judge Racek acted in excess of his jurisdiction, conducted proceedings contrary to due process of law. On November 7 & 8, 2000, and thereafter, he refused to consider the only competent evidence submitted after November 2, 1999, except he was willing to accept Matrix's evidence on January 5, 2001, while simultaneously rejecting the right of TAG and Grettum to present evidence.[56] This documents a judicial unwillingness to protect substantial rights and liberties guaranteed by Federal and State law including (a) court proceedings before a fair and impartial judge based upon properly submitted evidence [14th Amendment], (b) the right to be free from unconstitutional "takings" of property by judicial process [14th, Amendment], (c) the right to a jury trial for acts occurring after the "final judgment" of November 2, 1999 [Art. I, § 13], and (d) the right to judicial equal protection of the law [14th Amendment].

The transcript of the November 7, 2000, proceedings, and all proceedings thereafter, substantiate a judicial

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[54] Transcript of Court Overseen Closing page 24-34; 42-43.

[55] See Preamble to the North Dakota Code of Judicial Conduct, and its Cannons, recognizing "the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us."

[56] Court Overseen Closing January 5, 2001.

willingness to contravene Federally and State protected rights[57] by a judicial officer that: (a) erroneously attributed prior findings to District Judge Erickson,[58] (b) showed a willingness to assert jurisdiction over persons not parties,[59] (c) failed to recognize the limited role of Grettum, and, without evidence or legal basis, required him to close,[60] (e) altered the terms of the Option to Purchase by turning it into an actual sale or contract to sell property,[61] (f) deciding irrelevant issues,[62] (g) made erroneous factual findings without evidence,[63] (h) required TAG and Grettum to cure defects in title,[64] (i) wrongfully requiring compliance with the terms of a closing order directed by the Judge thereby altering contractual terms,[65] (j) requiring TAG and Grettum to convey real property without an unconditional tender,[66] (k) requiring TAG and Grettum to convey marketable title,[67] without factual basis,[68] (l) determining that due process of law does not require a trial for facts arising after November 2, 1999,[69] (m) amending the Judgment so

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[57] The Petition for Rehearing dated December 21, 2000, in No. 20000192 is incorporated by reference.

[58] Tr. 11/7/00 p. 32.

[59] Tr. 11/7/00 p. 32.

[60] Tr. 11/7/00 p. 32.

[61] Tr. 11/7/00 p. 32.

[62] Tr. 11/7/00 p. 32.

[63] Tr. 11/7/00 p. 32-33.

[64] Tr. 11/7/00 p. 33.

[65] Tr. 11/7/00 p. 33.

[66] Tr. 11/7/00 p. 33.

[67] Tr. 11/7/00 p. 33.

[68] Tr. 11/7/00 p. 40.

[69] Tr. 11/7/00 p. 38.

as to require a conveyance, or be subjected to other subsequent proceedings,[70] (n) making determinations of fact totally unsupported by credible evidence, and in violation of due process of law which would require presentation of facts before judicial action,[71] (o) and incredibly, determining that due process of law does not require a trial for facts arising after November 2, 1999, particularly when the uncontested facts establish that Matrix **has not complied** with the Option to Purchase, and when challenged by counsel for TAG and Grettum, the District Court announced that Matrix would not have to comply with the terms of the Option to Purchase.[72]

This judicial one-sidedness continued into the January, 2001, proceedings when Matrix could present evidence – but not TAG or Grettum.[73]

Matrix had one measure of judicial oversight, while TAG and Grettum had another – there was no equal protection of the law in Judge Racek's court.

Point 3. Matrix Properties Corporation Has Abandoned Its Contract and Forfeited Its Right to Specific Performance.

If a contract to sell was formed by the initiation of Matrix's Complaint, Matrix necessarily agreed to " . . . accept the title in its existing condition with no further

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[70] Tr. 11/7/00 p. 38.

[71] Tr. 11/7/00 p. 39.

[72] Tr. 11/7/00 p. 41-42.

[73] Court Overseen Closing of January 5, 2001.

obligation on the part of TAG to correct any defect. . . ."[74] Matrix further agreed to close within 45 days of its July 1, 1999, notice of exercise.[75]

Since the entry of the November 2, 1999, Judgment, Matrix has balked at the contract it formed by issuing its Complaint. Instead of accepting the title that TAG had on July 9, 1999, with no further obligation upon TAG to correct any deficiencies, it has demanded that TAG obtain title from the Clapp Land Trust and convey it. Instead of closing in 45 days, after its exercise, it has not tendered performance even to this date.[76]

* * *

[74] App. p. 73-74.

[75] App. p. 75.

[76] The January 5, 2001, tender was a conditional tender in that it was made by personal check and the mode of payment was objected to by TAG. App. p. 602-606; Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Matrix Properties Corporation,
a Minnesota corporation,

Plaintiff Appellee,

vs.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota,

Defendants-Appellants.

Supreme Court
No. 20010060

Civil No.CV-99-02045

PETITION FOR REHEARING

APPEAL FROM THE ORDER OF THE DISTRICT COURT OF CASS COUNTY DATED NOVEMBER 8, 2000; THE ORDER OF THE DISTRICT COURT OF CASS COUNTY DATED JANUARY 5, 2001; AND THE ORDER OF THE DISTRICT COURT OF CASS COUNTY DATED FEBRUARY 16, 2001, AND ANY AND ALL INTERLOCUTORY ORDERS OR VERBAL ORDERS ISSUED BY THE DISTRICT COURT OF CASS COUNTY, NORTH DAKOTA, IN NOVEMBER AND DECEMBER, 2000, AND JANUARY 2001, WHETHER IN WRITING OR NOT

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with uncertainty and strong convicting views." *Houser v. Gilbert*, 364 N.W.2d 62, 66 (N.D. 1985). Each argument made by TAG Investments and Grettum were plausible, and were supported by (1) a factual basis [the unchallenged affidavits of James A. Grettum and the actual wording of the subject Option to Purchase], (2) North Dakota case law or statutory law, and (3) case law from other states or federal jurisdictions [and federal statutes].

Just because TAG Investments and Grettum view the post-judgment factual circumstances and interpret the option contract differently than Matrix Properties Corporation does not make their present appeal frivolous. For illustrative purposes, the following issues clearly show a plausible argument exists thereby making it impossible for the Supreme Court to determine the appeal is frivolous:

1. TAG Investments and Grettum raised the issue whether they were denied Due Process of Law when the lower court refused to consider, or determine, post-judgment facts to see if Matrix Properties Corporation's post judgment conduct and lack of performance allowed TAG Investments to be relieved of the November 2, 1999, Judgment. Judge Racek's statements, in the record, clearly establish that Judge Racek would not consider any post-judgment fact submitted to him concerning any issue in that he represented he was merely enforcing the Judgment of November 2, 1999. See Transcript of Proceeding dated November 7, 2000, pages 37 through 39. Judge Racek made it clear that there would be no evidentiary

hearing as to any events that occurred after the Judgment of November 2, 1999.[1] Due Process of Law requires a litigant be afforded an opportunity to be heard "'at a meaningful time and in a meaningful manner.'" *Barry v. Barchi*, 443 U.S. 55, 66 (1979), citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965).

The lower court's failure [or refusal] to consider the post-judgment evidence submitted by TAG Investments and Grettum as to Matrix's failure to tender under the terms of the option contract – post-judgment – constitutes a denial of Due Process of Law. TAG Investments and Grettum submitted five (5) cases from four different jurisdictions establishing that if a successful party to a specific performance decree fails to perform a condition thereof on which his rights under the decree depend, the successful party is no longer entitled to enforce the right of specific performance against his opposing party and the latter is entitled to be relieved of the decree. *Shallow Brook Associates v. Dube*, 599 A.2d 132, 137 (NH 1981); *Lancaster v. Simmons*, 621 S.W.2d 935, 944 (Mo. Ct. App, 1981); *Cook v. Eilers* 608 S.W.2d 103 (Mo. App. 1980); *McClain v. Roberts*, 200 N.W. 613 (Ia. 1924); and *Delray Beach Whitehouse Apts. Inc. v. Hoffman*, 257 So.2d 550 (Fla. 1972). Certainly these cases establish that TAG Investments and Grettum are entitled to some type of fact finding hearing when Matrix Properties Corporation fails

[1] Contrary to his position, Judge Racek did allow Matrix Properties Corporation to introduce evidence on January 5, 2001 [Transcript of January 5, 2001, pages 14 and 15], and also allowed evidence received ex parte which, incredibly, was later included as part of his January 5, 2001, Order [Appendix, Volume B, pages 561-593].

to perform a condition that its rights under the judgment are dependant upon. If this Court accepted the rational[e] of said decisions of other states, reversible error would then appear. Certainly, though, there is a plausible Due Process argument, and it cannot be summarily said the issue was frivolous. Neither Matrix Properties Corporation, the lower court, nor even this Court, has cited one case that would establish that TAG Investments and Grettum are not entitled to an opportunity to be heard as to post-judgment events.

2. TAG Investments and Grettum raised the issue whether they were denied Equal Protection [of] the Law, and a plausible argument exists for such issue. "(T)he purpose of the equal protection clause of the Fourteenth Amendment is to secure to every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willobrook, et al., v. Olech*, 528 U.S. 562, 564 (2000), citing other Supreme Court decisions. Equal protection claims can be brought by a "class of one" when a litigant merely "alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment," *Village of Willobrook, et al., v. Olech*, 528 U.S. 562, 563 (2000), citing other Supreme Court decisions. In the instant case, TAG Investments and Grettum were treated differently than other litigants. Their postjudgment affidavits, never controverted by Matrix Properties Corporation, identifying post-judgment actions and inactions which were not consistent with the Option [and which actions also acted as a counteroffer which was properly rejected by TAG Investments], were not considered by the trial court while

Matrix Properties Corporation could present evidence. TAG Investments and Grettum did not have equal access to the court. Moreover, TAG Investments contractual rights were ignored. Judge Erickson's Memorandum Opinion recognized the Option to Purchase required a closing within 45 days of the Notice of the Exercise of the Option, and made much of the actual existence of a closing within the required time frame.[2] Matrix Properties Corporation's lack of a tender within the 45 days mandated by the Option to Purchase [the contract term and the "law of the case"] means that Matrix Properties Corporation did not perform its promise – which obviously still had not occurred on December 12, 2000. TAG Investments and Grettum received no compensation for Matrix Properties Corporation's breach. Under North Dakota law, failure to fulfill its own promised performance normally means that Matrix Properties Corporation could no longer seek specific performance by either TAG Investments or Grettum. N.D.C.C. § 32-04-08. Matrix's lack of tender within the mandated 45 days following notice of exercise of its option on July 1, 1999, should have either precluded Matrix Properties Corporation from further specific performance or payment of compensation to TAG and Grettum for the want of the entire performance by Matrix Properties Corporation. TAG Investments and Grettum, without explanation by any court, was denied the benefits and protections of said statute which should have uniform operation. Article I, § 22, Constitution of North Dakota. Similarly, under North Dakota law, a tender payment by check is a conditional tender [N.D.C.C. § 41-02-59], and

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[2] Appendix, Volume A, pages 134, 144-148.

non-conforming tenders can be rejected. *Nygard v. Continental Resources*, 1999 ND 172, 598 N.W.2d 851. Without explanation, this Court denied TAG Investment the right to reject the conditional form of payment, which was also inadequate as to amount [the easement land was not paid for, nor recognized, by Matrix Properties Corporation, among other reasons].

C. Matters appealed herein were matter[s] not previously heard by this Court.

This Court erroneously said that the issues on this appeal are governed by *Matrix Properties Corporation v. TAG Investments*, 2001 N.D. 213, 622 N.W.2d 432 (2000) [*Matrix I*], and *Matrix Properties Corporation v. TAG Investments*, 2000 N.D. 88, 609

* * *

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Matrix Properties Corporation, formerly known as E.W. Wylie Corporation, a Minnesota corporation,

Plaintiff Appellee,

vs.

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota,

Defendants-Appellants.

Supreme Court No. 20010228

District Court No. CV-99-02045

BRIEF OF DEFENDANTS – APPELLANTS

APPEAL FROM JUDGMENT OF CASS COUNTY DISTRICT COURT ENTERED ON SEPTEMBER 11, 2001

CASS COUNTY DISTRICT COURT,
EAST-CENTRAL JUDICIAL DISTRICT
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* * *

comments as to what would happen on January 5, 2001, the date of the motion hearing. On January 5, 2001, Judge Racek did not follow through with what he orally said would occur on January 2, 2001, after Matrix submitted another ex parte communication to Judge Racek. On January 5, 2001, Judge Racek issued an order of conveyance and authorized Matrix to send to the Garaas Law Firm three personal checks, previously rejected by TAG at the time of the January 5, 2001, proceedings.

On the date the subject monetary judgment was entered, TAG had not been fully paid, **nor has it been paid to date**. Matrix, TAG, and now Carol A. Grettum are involved in other litigation in Cass County District Court not only concerning the **legal** rights to the real property, but also the effect of Matrix's stop payment order on one of the three checks issued on January 5, 2001.[33]

TAG and Grettum appealed Judge Racek's Order of January 5, 2001, believing such Order was not consistent with the December 12, 2000, Order of the Supreme Court, nor the rights of TAG and Grettum expressed in the Option to Purchase and November 2, 1999, Judgment [as revisited by the Supreme Court on December 12, 2000]. While said case was still on appeal, Judge Dawson issued a monetary judgment against both TAG and Grettum, stating on the record:

> "According, the Court has reviewed the affidavits that are attached to these proceedings setting forth the specific costs, the period of time they were incurred, the attorney's fees; which

[33] Appendix pages 674 through 690.

have been well documented in the period of time they were and the request for loss of use of the property from August through January and their calculations attendant thereto.

Court having considered all of the above, finds that there is justification for issuing its order. Ordering defendants jointly and severally to pay the costs in the amount requested. Pay attorneys' fees in the amount requested and to pay damages for loss of use in the amount requested."[34]

Despite a request to do so, Judge Dawson refused to identify the legal basis for her order.[35]

By Mandate issued on September 12, 2001, the Supreme Court affirmed the January 5, 2001, Order under N.D.R.App.P. 35.1(a)(1) and (7).

LAW AND ARGUMENT

Point 1. The lower court and Matrix failed to establish the procedural or statutory basis, including the lower court's jurisdiction, for the monetary judgment against appellants and said judgment is void or voidable.

Matrix's motion to the District Court of Cass County was an unprecedented postjudgment motion for damages in a specific performance action in which a final judgment had been entered almost two years earlier. Neither Matrix, nor the lower court, identified the legal basis for the

[34] Transcript of Hearing of August 27, 2001, page 20.

[35] Transcript of Hearing of August 27, 2001, page 21.

unprecedented award of "costs," "damages," and "attorney fees" two years after a final judgment had been entered. The post-judgment motion procedure sanctioned by the lower court utterly denied TAG and Grettum their right to proper pleadings notifying them of the issues of the lawsuit, discovery, trial of issues of fact and a judicial decision based upon properly introduced evidence considered in light of the law. In other words, TAG and Grettum were denied due process of law as expressed in North Dakota Rules of Civil Procedure.

The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America prevents the denial to litigants of established adjudicatory procedure. See, *Boddie v. Connecticut*, 401 U.S. 371, 280 (1971); *Logan v. Zimmerman Brush Co., et. al.*, 455 U.S. 422 (1982). As stated by the Eighth Circuit Court of Appeals, in an unpublished opinion, entitled *Kessler v. Crichton*, 221 F.3d 1342 (Full-Text Format at 2000 U.S.App. Lexis 14560): "A **judgment is void** if the rendering court lacked jurisdiction or acted in a manner inconsistent with due process." See also *Syllabus* 3 of *Cokins v. Frandsen*, 136 N.W.2d 377 (N.D. 1965) for authority that untimely post-judgment orders, that amend final judgments, are also void.

In issuing the monetary judgment, the lower court failed to fulfill its duties under N.D.R.Civ.P.52 (a) in that the lower court issued a judgment without a trial of facts, without finding facts specially, and without stating separately its conclusions of law thereon.

Nor can the monetary judgment be considered to be an amendment, under N.D.R.Civ.P. 52 (b), to the November 2, 1999, Judgment because it was not made within

fifteen days of the entry of said judgment. This jurisdictionally requisite time period of fifteen days cannot be extended by the lower court. N.D.R.Civ.P.6 (b). See also, *Gribble v. Harris*, 625 F.2d 1173 (5th Cir. 1980).

Similarly, the procedure to obtain the monetary judgment cannot be sustained under N.D.R.Civ.P. 59. The November 2, 1999, Judgment did not involve a trial to the court. Further, the motion to amend the November 2, 1999, Judgment, so as to provide for a monetary judgment was not made within fifteen days of November 2, 1999 as required by Rule 59(j). This time period of fifteen days cannot be extended. N.D.R.Civ.P.6(b). See also, *Neubauer v. Neubauer*, 524 N.W.2d 593, 594 (N.D. 1994).

The procedure to obtain the monetary judgment cannot be sustained under N.D.R.Civ.P.60(b) in that said rule does not provide for affirmative relief. *McKenzie Co. Social Service Bd. v. C.G.*, 2001 ND 151, 633 N.W.2d 157.

The award of damages for claimed "costs" and post-judgment attorney fees cannot be sustained under N.D.R.Civ.P. 54 (e)(1) or (2). Judgment costs of $90.00 had originally been taxed in November, 1999, before the entry of the judgment.[36] Nothing within Rule 54(e)(1) would allow for "costs" to be taxed almost two years after the entry of judgment. *Vanover v. Kansas City Life Ins. Co*, 533 N.W.2d 192 (N.D 1996).

The failure to bring a motion for attorney fees within fifteen days of the entry of the November 2, 1999, Judgment, as required by Rule 54 (e)(2), should also have been

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[36] Appendix pages 38, 39.

considered a waiver of any claimed attorney fees. *Logue v. Dore*, 103 F.3d 1040, 1047 (1st Cir. 1997).

The procedure used to obtain the monetary judgment is also inconsistent with N.D.R.Civ.P.43 because there was no trial and the alleged "damages" was based solely upon claims to "damages" made by the attorney for Matrix – AND not upon evidence of "damages." The sole affidavit, or evidence, that supported Matrix's motion for damages was that of Attorney Spaeth, and the Affidavit was directed towards alleged "costs" and attorney fees – not damages for failure to convey.

The monetary judgment is inconsistent with N.D.R.Civ.P. 7 in that TAG and Grettum were denied proper pleadings identifying the basis for the claim for damages and the right to plead in response thereto. It is to be remembered that Matrix's original Complaint asked for damages only in the alternative, and did not ask for the particular "damages" now claimed through its attorney's arguments to the court.

The failure to timely follow the above mentioned rules of procedure, the failure to require evidence to sustain the requested "damages," and the failure to follow the law as to what are recoverable "costs," establish due process violations and that the monetary judgment is void.

The monetary judgment is also void because the lower court did not have jurisdiction to render a monetary judgment that amends the prior November 2, 1999, Judgment. *Cokins v. Frandsen, supra.*, page 379. The district court's jurisdiction over TAG Investments and Grettum and the subject matter, other than to enforce the November 2, 1999, Judgment, ended on the date this Court's Mandate was issued in the first appeal. See

Waterhouse v. Iowa District Court for Linn County, 593 N.W.2d 141 (Iowa 1999) at page 142:

> " . . . In the absence of a remand or procedendo directing further proceedings in the trial court, the jurisdiction of the district court terminates both as to the parties and subject matter when a district court judgment has been affirmed. *Franzen v. Deere & Co.*, 409 N.W.2d 672, 674 (Iowa 1987). The district court retains jurisdiction during and after appeal from its final judgment to enforce the judgment itself, but the district court does not have the authority to revisit and decide differently issues already concluded by that judgment. *Id.*"

This Court is also reminded that N.D.C.C. §27-05-27 places exclusive authority in the Honorable Ralph R. Erickson to modify the judgment of November 2, 1999, unless he is unable to act. There is nothing in the record that establishes that Judge Erickson is unable

* * *

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Matrix Properties Corporation,

Plaintiff Appellee,

vs.

JCG Investments, L.L.C.; Anderson and Grettum Investments; R. Allan Rostad; Thomas Richards; and all other persons, unknown or claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint,

Defendants-Appellants.

Supreme Court No. 20020011

District Court No. 09-01-C-1052

BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF NOVEMBER 14, 2001, AND THE ORDER DENYING MOTION TO ALTER, AMEND, OR VACATE THE JUDGMENT DATED JANUARY 3, 2002.

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT HONORABLE CYNTHIA A. ROTHE-SEEGER

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* * *

property cannot maintain a quiet title action against the other party if a party has a cognizable interest in the real property under the doctrine of equitable conversion. The Supreme Court of Iowa, in reversing a quieting title judgment, and dismissing the plaintiff vendor's action, in *Krotz v. Sattler*, 586 N.W.2d 336, 339 (Iowa 1998) stated:

> "An action to quiet title 'presupposes complete title in the plaintiff as against the defendant.' *Cody v. Wiltse*, 130 Iowa 139, 144, 106 N.W. 510, 511 (1906). The action cannot be sustained if the defendant proves some 'real interest' – as distinguished from some 'mere apparent or asserted right' – in the property. *Id.* Sattlers have clearly furnished that essential proof here.
>
> When Krotz agreed in 1985 to sell the railroad property to Sattlers, the equitable title passed to Sattlers. *Cumming v. First Natl. Bank*, 199 Iowa 667, 668, 202 N.W. 556, 556 (1925). Krotz retains *legal* title pending payment of the purchase price, maintaining an interest in the property 'as security for his debt, and as trustee for the purchaser.'"

And as further stated in *Krotz v. Sattler, supra.*, at page 340:

> "In short, the court erred when it quieted title in Krotz because Sattlers lawfully maintain a cognizable interest in the property. The court of appeals properly recognized this error and dismissed Krotz's quiet title action. We concur in

> the court of appeals' reasoning and decision and, accordingly, reverse the judgment of the district court."

Since TAG and Carol have a cognizable interest in the real property (**legal title** at the minimum) because of lack of full payment (or no payment), it was error for the lower court to issue Summary Judgment against them. Upon attorney Spaeth's disclosure that Matrix had stopped payment on the joint check, the action brought by Matrix should have been automatically dismissed.

Point 3. *Res judicata* and collateral estoppel were not applicable, do not support the Judgment entered in the quiet title action, and violates due process rights of TAG and Carol.

A. The lower court's reliance on *res judicata* was misplaced.

The issues raised in the Answer of TAG and Carol Grettum, and their defenses to the summary judgment motion, were not subject to the doctrines of *res judicata* or collateral estoppel. As stated by the Supreme Court of North Dakota, in *Mead v. Farmers Union Mut. Ins. Co.*, 2000 ND 139, paragraph 15, 613 N.W.2d 512, 515:

> "'Res judicata means that a valid, existing final judgment from a court of competent jurisdiction is conclusive, with regard to the issues raised, or those that could have been raised, and determined therein, as to the parties and their privies in all other actions.' *Ohio Cas. Ins. Co. v. Clark*, 1998 ND 153, ¶ 23, 583 N.W.2d 377 (quoting *Peacock v. Sundre Township*, 372 N.W.2d 877, 878 (N.D. 1985)). Collateral estoppel 'forecloses the relitigation, in a second action based on a

> different claim, of particular issues of either fact or law which were, or by logical and necessary implication must have been, litigated and determined in the prior suit.' *Ohio Cas. Ins. Co.*, at ¶ 23 (citation omitted)."

Thus, to invoke either the doctrine of *res judicata* or collateral estoppel in North Dakota, the precise issue must be actually determined upon the merits in the former proceedings. As stated in *Farmers State Bank v. Slaubaugh*, 366 N.W.2d 804, 806 (N.D. 1985):

> "This court has stated that the term 'res judicata' can be defined as 'a thing or matter that has been definitely and finally settled and determined on its merits by the decision of a court of competent jurisdiction.' *Robertson Lbr. Co. v. Progressive Contractors, Inc.*, 160 N.W.2d 61, 76 (N.D. 1968), citing *Knutson v. Ekren*, 72 N.D. 118, 5 N.W.2d 74 (1942). This court in *Dolajak v. State Auto. & Cas. Underwriters*, 252 N.W.2d 180 (N.D. 1977), in Syllabus ¶ 2, stated:
>
> > '2. In order for an issue to be considered res judicata, it is not enough to have been involved in an earlier action, but must have been actually litigated and decided in that action.'"

One cannot rely upon the Order of January 5, 2001, for *res judicata* or collateral estoppel purposes for issues raised in this lawsuit. The Order of January 5, 2001, is not a judgment, and the matters raised by this lawsuit were

not litigated nor determined by Judge Racek on January 5, 2001.[47]

The Order of January 5, 2001 contains no factual findings made by Judge Racek as to (a) TAG's rights to a vendor's lien until full payment, (b) Carol's rights to payment and to assert her rights as an innocent purchaser for value, (c) payment or retention of easement rights by TAG as expressly set forth in the underlying Option to Purchase, (d) matters of possession until final payment, and (e) the effect of the stopped payment check, among other issues.

As noted in Point 1 of this Brief, since a court of equity cannot create a **legal title** (because the matter was reserved to a *court of law* with the absolute right to a jury trial) the **legal title** would never be in issue in the former equitable proceedings. Thus, it can never be said that the matters raised by the Answer of TAG or Carol were actually litigated or determined in the former proceedings.

It is also to be remembered that the Order of January 5, 2001, is merely an order made upon a motion and doctrines of *res judicata* or estoppel do not apply to said type of orders with equal strictness as they do to judgments. The general rule is found in 56 Am Jur 2d Motions, Rules, and Orders § 30:

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[47] Judge Racek viewed his actions in issuing the order of January 5, 2001, as part of the Court's continuing jurisdiction to enforce the November 2, 1999, Judgment. Transcript of Proceedings of January 5, 2001, Court Overseen Closing, at page 11, lines 5 through 11. Judge Racek did not view the January 5, 2001, proceedings as an evidentiary proceeding. Transcript of Proceedings of January 5, 2001, at page 14, line 24 through page 15, line 1.

> **"§30. Res judicata; estoppel.**
>
> It is generally held that the doctrine of res judicata or, where applicable, of estoppel does not apply to a decision on motion with the same strictness as to a judgment, . . .
>
> * * *
>
> An order affecting a substantial right and appealable, made in determining a motion after a full hearing has been had on a controverted question of fact, and deciding a point actually litigated, has been held to be conclusive on the points actually litigated and determined, and binding on the parties in a subsequent action, at least where there is no showing of a change in circumstances. However, such an order is not binding as to facts that might have been but were not litigated on the hearing of the motion. Nor is the decision on the motion res judicata where the factor of a full hearing is absent. * * *

Applying the general rule, the Order of January 5, 2001, cannot support a claim of res judicata or collateral estoppel because the factor of a full hearing was absent. No evidence of factual events subsequent to November 2, 1999 (the date of the entry of the first judgment), has ever been considered by the former court. Thus, TAG and Carol retained all legal defenses that they might have to any attack on their **legal title** based upon post November 2, 1999, facts.

There is nothing within any of the decisions of the former district court, or even the Supreme Court of North Dakota, that would preclude TAG from maintaining an action to foreclose its vendor's lien under the equitable contract created in the Supreme Court of North Dakota's

decision of December 12, 2000, and which revisited the November 2, 1999, Judgment. There is nothing within the decisions of the former courts that would preclude Carol from asserting that she is an innocent purchaser for value. There is nothing within the former decisions that preclude TAG from asserting (a) continued option rights under the Clapp Family Trust, (b) the right to an easement, or (c) payment therefor, for such land, or TAG's interest in such land as expressed in the Option to Purchase.

The above referenced matters that were not litigated or decided by the Order Of January 5, 2001, should not be determined in a quiet title action. Many of the matters relate to legal title, and both TAG and Carol are entitled to have a jury trial to resolve such issues.

B. The lower court's judgment, based upon res judicata is inconsistent with the Fourteenth Amendment to the Constitution of the United States.

Basing the summary judgment, below, upon a claim of *res judicata* denies both TAG and Carol their constitutional right to due process of law and equal protection of the law. As stated by the United States Supreme Court in *Oritz, et. al., v. Fireboard Corporation*, 527 US 815 (1998), beginning at page 846 in discussing due process principles:

> " * * * he is not designated as a party or to which he has not been made a party by service or process,' *Hansberry v. Lee*, 311 U.S. 32, 40, 85 L. Ed. 22, 61 S. Ct.115 (1940), it being 'our "deep-rooted historic tradition that everyone should have his day in court,'" *Martin v. Wilks,* 490 U.S. 755, 762,104 L. Ed. 2d 835,109 S. Ct. 2180 (1989) (quoting 18 C. Wright A. Miller, & E. Cooper,

> Federal Practice and Procedure § 4449, p. 417 (1981)); see *Richards v. Jefferson County,* 517 U.S. 793, 798-799135 L. Ed. 2d 76, 116 S. Ct. 1761 (1996). Although "'we have recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,' or 'where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate,' *Martin, supra*, at 762, n. 2 (citations omitted), the burden of justification rests on the exception."

The former action between Matrix, TAG and James A. Grettum was an action for specific performance – an equitable action *in personam*. It could not bind Carol who was not a party and was not served process in said former equitable action. The Due Process Clause of the Fourteenth Amendment would require that Carol receive actual notice, not constructive notice, and a meaningful opportunity to be heard. See *Richards v. Jefferson County*, 517 U.S. 793 (1996). In *Richards v. Jefferson County*, the United States Supreme Court determined that before a non-party is bound by a prior proceeding under principles of *res judicata* the " . . . prior proceeding, to have binding effect on absent parties, would at least have to be 'so devised and applied as to insure . . . that the litigation is so conducted as to insure the full and fair consideration of the common issue.'" *Richards*, 116 S. Ct. at 1767, quoting, *Hansberry v. Lee*, 311 U.S. 32, 43, 85, L. Ed. 22, S. Ct. 115 (1940). The doctrines of *res judicata* and collateral estoppel are not applicable to claims that do not arise out of the Option Agreement of October 14, 1996 – the contract litigated. The legal title of James A. Grettum and the

underlying Option rights between TAG and the Clapp Family Trust were not litigated in the former proceedings. *Res judicata* and collateral estoppel are not applicable. See, *West v. Carlson*, 454 N.W.2d 307, 312 (N.D. 1990).

The post-judgment proceedings in the former specific performance action cannot bind Carol A. Grettum in that the prior proceedings were not conducted so as to insure the full and fair consideration of her payment for the land she owns. This issue of payment to Carol was not addressed in the November 2, 1999, Judgment, nor litigated in the prior equitable action. In obtaining the original November 2, 1999, judgment, Matrix, in its Brief, stated the following in reference to the interest James A. Grettum had received from the Clapp family trust which was later conveyed to Carol.

"To the extent that TAG has further transferred Option Property to Grettum, Grettum is obligated to convey the property to E.W. Wylie because he took the property subject to E.W. Wylie's rights under the Option Agreement. *Bangen v. Bartelson*, 553 N.W.2d 754, 758 (N.D. 1996)."[48]

* * *

It is undisputed that James A. Grettum did not get any property from TAG. The matter of payment to James A. Grettum was not litigated at the time the November 2, 1999, judgment was entered. Matrix framed the issue

[48] Page 20 of Docket entry 7 (Plaintiffs Brief) in Cass County District Court CV-99-02045.

upon which the November 2, 1999, summary judgment was entered, as follows:

> "This motion raises the legal question of whether E.W. Wylie timely exercised a portion of the option property and thereby retained its rights under the Option Agreement to Purchase the remainder of the option property. Defendants have refused to convey the remaining property, arguing that E. W. Wylie did not tender the full purchase price at the time it exercised its initial option and, thus, did not 'purchase' the property in a timely manner."[49]

The post judgment proceedings in the former equitable action were post judgment proceedings claiming only to "enforce" the judgment and did not involve any adjudications of factual matters. No findings of fact were made by the court in the former post judgment proceedings. Evidence submitted by TAG was not considered in the former post judgment proceedings. Without a proper adjudication of fact and law, the former post judgment proceedings can have no *res judicata* effect. The *in personam* judgment of November 2, 1999, as revisited by the Supreme Court of North Dakota on December 12, 2000, required TAG to convey upon full payment to it with statutory interest accruing upon the monetary amount awarded in the judgment. James A. Grettum was only required to provide a Quit Claim Deed under the terms of the underlying option.

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[49] Page 1 of Docket 7 in Cass County District Court CV-99-02045.

The payment for the interest that James A. Grettum received from Clapp Family Trust, which was transferred to Carol, was not litigated in the former proceedings and therefore the Fourteenth Amendment to the Constitution of North Dakota would preclude any Court from taking property away from one individual and give[ing] it to another individual, without a judicially determined contract, and without payment.[50] By Matrix's own admission, the former proceedings were not designed to pay Carol for her interest in land."[51]

An *in rem* judgment is not binding in a later action against Defendants who did not participate in the former proceedings and " . . . does not give rise to issue preclusion for any issues that were not actually litigated and decided."[52]

An *in personam* judgment cannot bind anyone without compliance with fundamental requirements which are:

> " . . . designation as a party, compliance with valid procedures designed to give notice of the action, and a basis for jurisdiction."[53]

In the former proceedings, Carol was not a party, nor designated a party. In the former action, Matrix failed to

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[50] Stopped payment order on a check repudiates the sale. *Zundel v. Farmers Union Grain Company of Edgeleley*; 79 N.W.2d 48 (N.D. 1956) at pages 52 and 53.

[51] Appendix, page 255.

[52] Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4431 at page 295.

[53] Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction §4449 at page 412.

properly comply with valid procedures to give Carol notice that her legal title could be taken without any compensation to her. In the former proceedings, a judgment describing the real property was not placed of record as is required by N.D.C.C. § 28-20-11, and therefore, Carol did not have constructive notice of the former judgment. No person can be bound by a judgment or order that she does not have actual or constructive notice. See *In Re Estate of Rask*, 177 N.W.2d 287, 291 (N.D. 1970). Failure of Matrix to follow statutory requirements of recording should mean that Carol is not charged with constructive notice. *Messersmith v. Smith*, 60 N.W.2d 276 (N.D. 1953). Even N.D.C.C. § 28-05-07, the lis pendens statute, has not been complied with in that it was not "followed by the first publication of the summons, or by the personal service thereof on a defendant, within sixty days after such filing." It is respectfully submitted that the former proceedings in CV-99-02045, including the post-judgment *lis pendens* cannot constitute constructive notice to Carol because N.D.C.C. § 28-20-11 was not complied with by Matrix. Without full compliance with the statute dealing with constructive notice, there can be no jurisdictional basis to take Carol's land. The interest received by James A. Grettum from the Clapp Family Trust, that was transferred to Carol, was not the subject of the November 2, 1999, Judgment, and therefore not the subject of the post judgment proceedings to "enforce" the judgment.

Similarly the easement rights, or payment for the loss of easement rights, was never adjudicated by the post judgment proceedings in the former equitable action and should not be the subject of *res judicata*.

Point 4. Judgment was issued against TAG, Carol without due process of law, without support in the facts or law, and should have been vacated by the lower court.

TAG and Carol timely moved to alter, amend, or vacate the Judgment entered on November 14, 2001, under N.D.R.Civ.P. Rules 52, 59, or 60. The grounds for Appellants' post judgment motions were that there insufficient evidence justified the lower court's findings expressed in its Memorandum Opinion and Judgment, and that they are contrary to law. The grounds for these post judgment motions should have required a vacation of the judgment, as shown herein:

1. Irregularity in taking of judicial notice:

The lower court, without first informing the parties or giving an opportunity to comment, took judicial notice of proceedings in Cass County District Court case # CV-99-02045, entitled "Matrix Properties Corporation v. TAG Investments, et al."

Before a court may take judicial notice of fact or law, N.D.R.Ev. Rule 201 requires that each party be afforded an opportunity to be heard as to the propriety of taking judicial notice. In this case, the lower court failed to give TAG and Carol the opportunity to be heard. This opportunity to be heard, before taking judicial notice of Civil # CV-99-02045, is essential to provide litigants with a fair hearing and to provide for an accurate account of the prior proceedings. Because of the failure of the lower court to provide an opportunity for hearing, the lower court misinterpreted orders and decisions in the prior proceedings which prejudicially affected the Appellants' opportunity to

present meaningful evidence and adversely affected the lower court's ultimate decision. Examples of the lower court's error in taking judicial notice include the following:

A. MISSTATEMENT OF THE RECORD OR FACT #1: On page two (2) of the Memorandum Opinion, the lower court erroneously claims that the November 8, 2000, Cass County District Court Order (docket number 123) is affirmed by the Supreme Court in its December 12, 2000, decision. The Supreme Court's December 12, 2000, decision, affirms *a June 26, 2000*, Order, not the November 8, 2000, Order. The November 8, 2000, Order that provided for an Amended Judgment appears to have been abandoned by the prior Court and Matrix because an Amended Judgment [ordered by Judge Racek] was never entered. TAG appealed the November 8, 2000, Order to the Supreme Court and the appeal was dismissed by the Supreme Court of North Dakota in February, 2001, because of the lack of an amended judgment as ordered by Judge Racek. If an amended judgment is prepared in the prior proceedings that conforms to the November 8, 2000, Order, TAG and James A. Grettum would still have a right to appeal, and right to review the propriety of, the seemingly abandoned November 8, 2000, Order.

B. MISSTATEMENT OF THE RECORD OR FACT #2: The lower court also errs on page two (2) of its Memorandum when it states:

> "On January 5, 2001, the Court held another hearing to perform the closing, but. . . ."

This statement is erroneous in that it attributes a "hearing" status to the January 5, 2000, proceeding. There was not a fact-finding "hearing" on January 5, 2001, and Judge Racek, himself, did not view his role on January 5,

2001, as a fact-finder or that he was holding a fact-finding hearing.[54] Because of a lack of a fact-finding hearing on January 5, 2001, it cannot be said that arguments of TAG, or the legal title of Carol, were "considered" by the Order of January 5, 2001. In other words, the lower court erred as to the effect of the January 5, 2001, proceeding and any resulting document called an Order.

C. MISSTATEMENT OF THE RECORD OR FACT # 3: The lower court also erred, on page four (4) of its Memorandum Opinion, in taking judicial notice that a check in the amount of $254,830.08 represents payment to TAG, James A. Grettum and Carol Grettum.[55] Under Rule 201(b) of the North Dakota Rules of Evidence a "judicially noticed fact must be one not subject to reasonable dispute * * * and (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned."

On November 1, 2001, attorney Spaeth informed the lower court that Matrix Property Corporation had stopped payment upon this check. Post judgment legal briefs of Matrix, in # CV-99-02045, submitted below to support the Rule 52, 59 and 60 motions, also establish that the payment was stopped on said check and that neither TAG nor Carol Grettum have been fully paid. Said briefs in CV-99-02045 establish that Carol Grettum was not intended to be paid by said check and only TAG was intended to be paid by said stopped payment check.[56] Thus, there is no

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[54] Appendix, pages 95,119 and 120.

[55] Appendix, page 191.

[56] Appendix, page 255.

evidence to support the lower court's Memorandum Opinion and Judgment that Carol, or even TAG, has been paid by said check.

D. MISSTATEMENT OF THE RECORD OR FACT # 4: The lower court erred when it takes judicial notice of Cass County District Court #CV-99-02045 and failed to give any weight to the December 12, 2000, decision of the Supreme Court of North Dakota. This decision clearly establishes that TAG and James A. Grettum did not have any duty to convey the subject property until they were tendered the purchase price in the 1996 Option Agreement.[57] What must be paid to TAG, before there is an obligation to convey, clearly has not been paid.

E. MISSTATEMENT OF THE RECORD OR FACT # 5: The lower court erred when it took judicial notice of the January 5, 2001, Order issued in Civil #CV-99-02045, and failed to recognize that said order *did not create any rights nor diminish any rights*, of either Matrix or TAG as expressed in (1) the Option to Purchase of October 14, 1996; (2) the November 2, 1999, Judgment; or (3) the November 2, 1999, Judgment as revisited by the Supreme Court of North Dakota on December 12, 2000. As re-interpreted by the Supreme Court of North Dakota on December 12, 2000, Matrix Properties received equitable title on November 2, 1999, and in turn TAG and James A. Grettum received the obligation of Matrix to pay the purchase price. As part of that purchase price was the obligation of Matrix to accept TAG's " . . . title in its

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[57] Appendix, page 87.

existing condition with no further obligation on the part of TAG to correct any defect . . . "[58]

Without issue, the purchase price has not been fully and unconditionally tendered, nor paid, by Matrix to TAG.

2. There is no evidence to support the judgment, and the judgment is contrary to the law and the Decision of the Supreme Court of North Dakota of December 12, 2000, for the following reasons:

A. The quieting title judgment was issued upon an erroneous finding that TAG and Carol have been fully paid for their legal interest in the subject real property. There is no evidence to support this finding and it is contrary to the sworn testimony of Carol and TAG (through the affidavit of James A. Grettum) and inconsistent with the admission of Matrix made by its legal counsel that discloses the check, relied upon by the lower court for payment, had actually been dishonored through a stopped payment order. Not only is there a lack of evidence to support the lower court's finding, the finding is contrary to law. A personal check, at best, is only a conditional payment. See, N.D.C.C. § 41-02-59. A dishonored check is not payment, and authorizes the obligee to enforce either the dishonored instrument or the original obligation. See, N.D.C.C. § 41-03-36 (c). A stopped payment order on a check repudiates the sale. *Zundel v. Farmers Union Grain Company of Edgley*, 79 N.W.2d 48, 52-53 (N.D. 1956).

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[58] Option to Purchase, paragraph 13, Appendix, pages 75 and 76.

The lower court erred [on page three (3) of its Memorandum] when it claimed that Appellants filed, without any basis, an Answer to the Complaint. TAG and Carol, in answering, relied upon identified law and actual facts that were later confirmed and admitted in open court concerning lack of payment – Matrix concedes there has been a stopped payment check.

B. The quieting title judgment is based upon an erroneous determination as to what would be owed to TAG before Matrix is entitled to a conveyance. The Supreme Court of North Dakota's decision of December 12, 2000, clearly mandates that the entire purchase price set forth in the Option to Purchase must be tendered to TAG and James A. Grettum before there is an on obligation on their part to convey. This monetary obligation, ordered by the Supreme Court of North Dakota on December 12, 2000, actually arose by way of the November 2, 1999, Judgment. Interest on this monetary obligation accrues, by statute, at the rate of 12% per annum. See, N.D.C.C. § 28-20-34.

The silence as to interest in the December 12, 2000, decision of the Supreme Court of North Dakota when revisiting the November 2, 1999, Judgment can only mean that statutory interest on said monetary amount was allowed to TAG as of November 2, 1999. See, *Dick v. Dick*, 434 N.W.2d 557 (N.D. 1989). The statutory interest that the Legislative Assembly of North Dakota has given TAG cannot be taken away by a court of equity. See, *Welch v. Welch*, 246 Neb. 435, 519 N.W.2d 262 (Neb. 1994).

C. The Judgment is inconsistent with N.D.C.C. § 35-20-01. The facts are undisputed that neither TAG, nor Carol, have been paid in full. The Legislative Assembly of North Dakota, by statute, has afforded TAG a vendor's

lien which a court of equity cannot take away. See, N.D.C.C. 35-20-01,

D. The Judgment is inconsistent with prior decisions of the Supreme Court of North Dakota. As earlier mentioned, the Judgment herein appealed is inconsistent with the decision of the Supreme Court of North Dakota, dated December 12, 2000, that TAG need only convey upon tender of the purchase price set forth in the Option to Purchase. It is also contrary to *Wagner v. Stroh*, 294 N.W. 195 (N.D. 1940) which holds a contract vendee cannot maintain a quiet title action against his vendor until the contract is fully paid. Even Matrix admits that there has not been full payment to TAG or Carol. The judgment is contrary to *Kuhn v. Hamilton*, 117 N.W.2d 81 (N.D. 1962) which fully recognizes that a vendor is entitled to further factual findings that a contract has been performed by the vendee (and that title can be quieted in the vendor subject to the opportunity to complete the contract by the vendee). The quieting title action denies TAG, or Carol, the opportunity to have a fact finding body determine whether Matrix has fulfilled the contract.

E. The Judgment is contrary to the Due Process and Equal Protection rights of Appellants, as guaranteed by the Fourteenth Amendment to the Constitution of North Dakota in that it deprives TAG and Carol legal title, and statutory rights, without payment. By denying said parties their legal title and their statutory vendors' lien, the Judgment deprives them of any reasonable remedy to protect their contractual and statutory rights. This violates the Fourteenth Amendment to the Constitution of the United States of America. See, *Poindexter v. Greenhow*, 114 US 270 (1885); and *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 US 673 (1930).

Point 5. The Judgment awarding attorney fees and costs against TAG and Jonathan T. Garaas is contrary to the facts of this case, the law, and Rule 11 of the North Dakota Rules of Civil Procedure.

A. The lower court, without proper inquiry as to factual matters and legal matters as required by N. D.R.Civ.P. Rule 11, awarded attorney fees as sanctions against TAG and Jonathan T. Garaas. The Affidavit of James A. Grettum, together with the statutory and case law relied upon by TAG and its attorney, establish the purpose of TAG's Answer was not for the purpose of delay or harassment, but rather to protect TAG's legal right to payment and its vendor's lien until full payment was made by Matrix. Thus, Rule 11(b)(1) of the North Dakota Rule of Civil Procedure was complied with by the Answer prepared by the Garaas Law Firm on behalf of all named Defendants, TAG and Carol.

The claims, defenses, and legal contentions were warranted by existing law. TAG, and its attorney, should be able to properly rely upon statutory law (N.D.C.C. § 35-20-01) as support for its vendor's lien. TAG's defenses and contentions that it is entitled to full payment before its legal title may be divested is supported by *Matrix Properties Corporation v. TAG Investments*, 2000 ND 213, 622 N.W.2d 432 and *Wagner v. Stroh*, 294 N.W. 195 (N.D. 1940). TAG's claim to interest and the amount owing on the purchase price is supported by N.D.C.C. § 28-20-34; *Dick v. Dick*, 434 N.W.2d 557 (N.D. 1989); the terms of the Option to Purchase of October 14, 1996; as well as other case law.

Thus, Rule 11(b)(2) was complied with by both TAG and its attorney, Jonathan T. Garaas, of the Garaas Law Firm.

The factual contentions made by TAG had evidentiary support. Matrix, itself, through its attorneys, acknowledged that neither Carol nor TAG have been fully paid for their interests in the land. The Option to Purchase establishes the purchase price and the terms of the contract formed by the November 2, 1999, Judgment. Other factual contentions were completely supported by proper citation to the record in the former proceedings, or testified to in an unchallenged Affidavit of James A. Grettum made on behalf of TAG. Thus, Rule 11(b)(3) and (4) were complied with by TAG and Jonathan T. Garaas.

In all, under a subjective or objective review of this case, it cannot be said that Rule 11 of the North Dakota Rules of Civil Procedure has been violated by submitting the Answer submitted. It cannot be said that TAG's position is frivolous or false. Thus, the award of attorney fees is not supported by evidence or law.

B. There is no evidence as to the reasonableness of the attorney fees requested, nor was there any link between the fees charged by the Vogel Law Firm to the defense of TAG in reference to the fees charged. Rule 11(c)(2) limits the monetary sanction to " . . . some or all of the reasonable attorney fee's and other expenses incurred as a direct result of the violation." By affidavit of September 25, 2001, attorney Spaeth testifies that Matrix has incurred fees in the amount of $7,211.00 in the quiet title

action.[59] In his affidavit, attorney Spaeth does not identify how any of these fees are tied to the submission of an Answer by TAG. Attorney Spaeth fails to identify any additional time or expense attributable to TAG's Answer. Thus, there is not only a lack of evidence to sustain the award of attorney fees, but there is a lack of evidence as to the reasonableness of the attorney fees, and that the attorney fees were caused by TAG in these proceedings.

Rule 11 of the North Dakota Rules of Civil Procedure does not allow a complete shifting of one party's attorney's fees to another party, but provides that only a shifting of "reasonable attorney's fees and expenses incurred as a direct result of the violation."

C. The judgment awarding attorney fees was made without a fair hearing to TAG or Jonathan T. Garaas, and by an improper and erroneous taking of judicial notice of prior proceedings. A motion under Rule 11 of the North Dakota Rules of Civil Procedure "must be made separately from other motions" and "must describe the specific conduct alleged to violate" See, N.D.R.Civ.P. 11(b). The motion of Matrix fails in both respects.

First it was made in conjunction with a summary judgment motion.

Secondly, the motion only contained broad assertions of lack of evidence or lack of valid legal claims to title without specifically informing TAG, and its attorney, as to why TAG cannot enjoy its statutory rights to a vendor's

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[59] Appendix, page 22.

lien until it has been fully paid as any other vendor in the State of North Dakota.

The lower Court misidentified allegations of the Answer and claimed that TAG was asserting the Option to Purchase was invalid.[60] All answering Defendants, in reference to whether the named defendants needed to quit claim, asserted that the subject option had expired.[61] This position had previously been advanced by Matrix.[62] Why is it sanctionable for TAG to allege matters previously asserted by Matrix in proceedings the lower court had judicially noticed?

The lower court further sanctioned TAG and its attorney for submitting a defense to the summary judgment motion.[63] All points raised in defense were supported by fact and law as revealed in this Brief. How can any party be sanctioned when their position is supported by admitted facts, case law and statutory law? The only attorney work possibly tied to TAG's response to the summary judgment motion are the oral arguments of the motion occurring on November 1, 2002. How can the approximate one-half hour hearing on November 1, 2001, result in a $7,211.00 sanction for attorney fee – an amount that supposedly previously existed on September 25, 2001?

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[60] Appendix, page 191.

[61] Appendix, page 12.

[62] Page 10, line 13, of Transcript of June 22, 2001 in CV-99-02045.

[63] Appendix, page 191.

CONCLUSION

In the lower court, Matrix did not present one fact, one statute, or case law that would authorize the summary judgment against TAG or Carol. TAG and Carol relied upon North Dakota precedent that an owner of an equitable interest cannot quiet title on its vendor, until it can establish full payment. *Wagner v. Stroh*, 294 N.W. 195 (N.D. 1940). No facts were

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Matrix Properties Corporation,
a Minnesota corporation,

Plaintiff-Appellee,

vs.

Supreme Court No. 20020026
Civil No. CV-99-02045

TAG Investments, a North Dakota partnership, and James A. Grettum, an individual resident of North Dakota,

Defendants-Appellants.

BRIEF OF APPELLANTS

APPEAL FROM ORDER OF THE DISTRICT COURT OF CASS COUNTY, DATED NOVEMBER 27, 2001, AND JUDGMENT OF DECEMBER 6, 2001

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT HONORABLE GEORGIA DAWSON

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* * *

Before there can be an equitable offset of judgments, mutuality is essential. As stated by *Harrison v. Adams*, 128 P.2d 9,10 (Cal. 1942): "And mutuality is essential, that is the judgments must be between the same parties in the same right."

Here, a third party, who has legal title which differs from the legal rights of TAG Investments, or James A. Grettum, has not been paid for her land. Even Matrix Properties Corporation must know that no Court can take away land from a legal owner without adequate compensation to the legal owner without violating the Fourteenth Amendment to the Constitution of the United States of America [and comparable provisions in the North Dakota constitution and statutes]. Because of Carol A. Grettum's interest in the land, the parties are different, and the rights are different. Mutuality does not exist and therefore, the lower court erred when it ordered an offset of judgments without adequate protection to Carol A. Grettum, or payment to her in an amount acceptable to her for her legal title.

North Dakota also requires mutuality (of at least parties) before there is a right to offset judgments. See *Patterson v. Ward*, 76 N.W. 1046 (N.D.1898). Again a third party's legal title is involved destroying the mandatory and essential mutuality of parties and rights.

Point 4. Entry of the December 6, 2001, Judgment is inconsistent with Due Process of Law as expressed in the North Dakota Rules of Civil Procedure.

Under the guise of submitting a cost judgment stemming from claimed costs in various appeals, a *third* judgment was entered by the lower court in this case.

Judgment was entered by way of attorney Spaeth preparing a proposed judgment,[56] sending a letter to the Clerk of Court,[57] a handwritten cryptic note by Judge Dawson authorizing the judgment,[58] and the entry of the judgment as submitted. No notice of a fact finding hearing was served nor was there a fact finding hearing ever afforded TAG Investments or James A. Grettum. Despite a letter of objection as to the procedure,[59] the third Judgment of December 6, 2001,[60] was entered in this single case. This incredible third Judgment of December 6, 2001, was entered despite this Supreme Court having jurisdiction stemming from the appeal of the second Judgment of September 11, 2001, of this single case. There is no rule of procedure that authorizes the Judgment of December 6, 2001, as entered without a proper notice and hearing, while this Supreme Court had jurisdiction. It amends the November 2, 1999, Judgment without resort to N.D.R.Civ.P. 52, 59 or 60. The Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America prevents the denial to litigants of established adjudicatory procedure. See, *Boddie v. Connecticut*, 410 U.S. 371 (1971); *Logan v. Zimmerman Brush Co., et al.*, 455 U.S. 422 (1982). See also *Syllabus* 3 of *Cokins v. Frandsen*,136 N.W.2d 377 (N.D.1965) for authority that untimely post-judgment orders, that amend final judgments, are also void.

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[56] Appendix page 85 through 90.

[57] Appendix page 80.

[58] Appendix page 84.

[59] Appendix page 70.

[60] Appendix page 85 through 139.

In issuing the December 6, 2001, Judgment, the lower court failed to fulfill its duties under N.D.R.Civ.P.52(a) in that the lower court issued the judgment without a trial of facts, without finding facts specially, and without stating separately its conclusions of law thereon.

Nor can the December 6, 2001, Judgment be considered to be an amendment, pursuant to N.D.R.CivP.52(b), to the November 2, 1999, Judgment because it was not made within fifteen days of the entry of said judgment. This jurisdictionally requisite time period of fifteen days cannot be extended by the lower court. See, N.D.R.Civ.P.6(b).

Similarly, the procedure to obtain the December 6, 2001, Judgment cannot be sustained under N.D.R.Civ.P.59 because the November 2, 1999, Judgment did not provide a trial and more than fifteen days have passed since the entry of the November 2, 1999, Judgment. See N.D.R.Civ.P. 6(b) and 59(j). The fifteen daytime period cannot be extended by the lower court. See, *Neubauer v. Neubauer*, 524 N.W.2d 593, 594 (N.D.1994).

The procedure to obtain the December 6, 2001, Judgment cannot be sustained under N.D.R.Civ.P. 60(b) in that said rule does not provide for affirmative relief. *McKenzie Co. Social Service Bd. v. C.G.*, 2001 ND 151, 633 N.W.2d 157.

The obvious purpose of Matrix Properties Corporation, when submitting the proposed December 6, 2001, Judgment, to the lower court was to elevate the January 5, 2001, Order to judgment status. By elevating the Order of January 5, 2001, to a judgment status, Matrix Properties Corporation obviously believes that its claim of *res judicata* in related proceedings [appeal in Supreme Court No.

20020011] is somehow enhanced. The Order of January 5, 2001, did not involve a fact finding hearing by [a] lower court. Judge Racek viewed his actions in issuing the Order of January 5, 2001, as part of the lower court's continuing jurisdiction to enforce the November 2, 1999, Judgment. Transcript of Proceedings of January 5, 2001, Court Overseen Closing, at page 11, lines 5 through 11. Judge Racek did not view the January 5, 2001, proceedings as an evidentiary proceeding. Transcript of Proceedings of January 5, 2001, at page 14, line 24, through page 15, line 1.

Incorporating the Order of January 5, 2001, into the December 6, 2001, Judgment allows Matrix Properties Corporation to continue to take advantage of two (or more) inconsistent and irreconcilable judicial positions. First, Matrix Properties Corporation obtained summary judgment on November 2, 1999, against James A. Grettum with the pre-judgment position that the legal title that James A. Gretturn had received from the Clapp Family Trust was not in issue.[61] Because Grettum acquiesced in the pre-judgment position of Matrix Properties Corporation that his legal title was not in issue, summary judgment was issued against him on matters solely related to the October 14, 1996, Option to Purchase. Post-judgment, Matrix Properties Corporation assumed a contrary position, and claimed that James A. Grettum's legal title (received from the Clapp Family Trust) may be obtained by Matrix Properties Corporation without payment to James A. Grettum.

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[61] District Court Docket Entry 7, page 20, footnote 3.

To protect his investments and his family, from this post-judgment attack on his property rights, James A. Grettum transferred the approximate 27 acres to his wife, Carol A. Grettum. The January 5, 2001, Order required the check, claiming to represent payment for said 27 acres, identify and be paid to TAG Investments, James A. Grettum and Carol A. Grettum. When Carol A. Grettum asked the court for the proceeds and the right of intervention to bring a motion, based upon her undisputed deed to the legal title, it was the position of Matrix Properties Corporation that only TAG Investments was entitled to be paid by it and the check issued with her name as one of the three payees was not meant to represent any payment to her.[62] In this action, Matrix Properties Corporation argues, [before the *third* Judgment of December 6, 2001, is entered] that Carol A. Grettum is too late to intervene. In the related quiet title action and at the same time, Matrix Properties Corporation inconsistently asserts the same check, which payment had been stopped by Matrix Properties Corporation, is payment to Carol A. Grettum. Then, pursuant to a mere request by Matrix Properties Corporation and without any hearing, on December 6, 2001, a judgment is entered incorporating the same language as the Order of January 5, 2001. This Judgment of December 6, 2001, boldly declares, "Pursuant to Sections 2,13 and 17 of the Option to Purchase, the sum of $254,830.58 is owed by Matrix to TAG for Tract B. Matrix has paid such sum to TAG, James A. Grettum and Carol A. Grettum, jointly."[63]

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[62] Cass County Docket entry 278

[63] Appendix page 89.

TAG Investments and James A. Grettum cannot square these inconsistent positions advanced by Matrix Properties with the facts or law or their rights to due process of law. A check dishonored by a stopped payment order is not payment to the payee. If the payee is only intended to be TAG Investments, then Carol A. Grettum cannot be said to even have been tendered any consideration for her legal title. It is elementary that without consideration there can be no legal contract, and without a legal contract to convey there is no obligation to convey. If it was too late to allow Carol A. Grettum to intervene on November 27, 2001, so that she could protect her legal title, or payment for the legal title, it should be too late to attack her legal title on December 6, 2001.

Judicial estoppel prevents a litigant from assuming a certain position in a legal proceeding, succeeding upon the assumed legal position, and thereafter, because his interest has changed, assume a contrary position adverse to the party who acquiesced in the position formerly taken by him. See, *State of New Hampshire v. State of Maine*, 532 U.S. 742 (2001). The inconsistent positions taken below by Matrix Properties Corporation in these proceedings, and clearly established in the order and judgment of the instant appeal, must be stopped.

The informal and *ex party* proceedings used to obtain the third judgment, in this single case, is repugnant to fundamental principles of justice and due process. *McWethy v. McWethy*, 366 N.W.2d 796 (N.D. 1985). The *ex parte* procedure to obtain the third judgment leads only to the impression of prejudice and bias and distress on a litigant. See, concurring opinion of Justice Meshke in *Disciplinary Action Against Wilson*, 461 N.W.2d 105 (N.D.1990.)

The undersigned also notes that the Judgment dated December 6, 2001, appears to directly violate N.D.R.Civ.P. 54(a) which provides that a "judgment may not contain a recital of pleadings . . . or the record of prior proceedings."

Point 5. The December 6, 2001, Judgment awarded Matrix Properties Corporation $75.00 in unauthorized costs for a brief that was not written.

On February 7, 2001, the Supreme Court of North Dakota issue[d] an Order of Dismissal of Supreme Court No. 20000356.[64] The Order of Dismissal was made before any briefs were written by any party. The Order of Dismissal was silent as to costs. Citing N.D.R.App.P. 39, Matrix Properties Corporation requested $100.00 in costs for this appeal March 5, 2001.[65] TAG Investments and James A. Grettum objected to the cost judgment because no costs were

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[64] Appendix page 45.

[65] Appendix page 41.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Matrix Properties Corporation,

Plaintiff-Appellee,

Supreme Court No. 20020011

vs. District Court No. 09-01-C-1052

JCG Investments, L.L.C.; Anderson and Grettum Investments; R. Allan Rostad; Thomas Richards; and all other persons, unknown or claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint,

Defendants-Appellants.

REPLY BRIEF OF APPELLANTS

APPEAL FROM THE JUDGMENT OF NOVEMBER 14, 2001, AND THE ORDER DENYING MOTION TO ALTER, AMEND, OR VACATE THE JUDGMENT DATED JANUARY 3, 2002.

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT HONORABLE CYNTHIA A. ROTHE-SEEGER

GARAAS LAW FIRM

Jonathan T. Garaas
Attorneys for Defendants-Appellants
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Fargo, ND 58103
North Dakota ID #03080

* * *

preclude TAG from asserting (a) continued option rights under the Clapp Family Trust, (b) the right to an easement, or (c) payment therefor, for such land, or TAG's interest in such land as expressed in the Option to Purchase.

The above referenced matters that were not litigated or decided by the Order Of January 5, 2001, should not be determined in a quiet title action. Many of the matters relate to legal title, and both TAG and Carol are entitled to have a jury trial to resolve such issues.

B. The lower court's judgment, based upon res judicata is inconsistent with the Fourteenth Amendment to the Constitution of the United States.

How can Matrix ignore due process principles recognized by the United States Supreme Court in *Oritz, et. al., v. Fireboard Corporation*, 527 US 815, 846 (1998), *Richards v. Jefferson County*, 517 U.S. 793 (1996), and *Hansberry v. Lee*, 311 U.S. 32, 43, 85, L. Ed. 22, S. Ct. 115 (1940)?[12] Matrix offered no authority that would allow a Court to take property away from Carol and give it to Matrix, without a contract, and without payment. By Matrix's own admission, the former proceedings were not designed to pay Carol for her interest in land.[13] How can

[12] TAG Brief, p.s 19-20.

[13] App., p. 255.

Matrix ignore the protective legal principles which are dependant upon the court only exercising jurisdiction over individuals or subject matters providing the proper jurisdiction exists, whether it be *in rem* jurisdiction or *in personam* jurisdiction.[14] Finally, how can Matrix ignore the statutes and resulting North Dakota case law cited by TAG and Carol?[15]

Failure to address those issues is a compelling admission that Matrix cannot overcome the law advanced by TAG and Carol.

Point 4. Judgment was issued against TAG, Carol without due process of law, without support in the facts or law, and should have been vacated by the lower court.

Matrix has failed to identify sufficient evidence to justify the lower court's findings expressed in its Memorandum Opinion and Judgment. Matrix's argument that providing a check, including a stopped payment check, constitutes payment cannot be validated.

1. Irregularity in taking of judicial notice:

Matrix fails to address the improper methodology employed by Judge Rothe-Seeger in taking judicial notice of other proceedings, nor did it address any of the five (5) resulting judicial errors committed by Judge Rothe-Seeger.[16]

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[14] TAG Brief, p.s 22-23.

[15] TAG Brief, p. 23.

[16] TAG Brief, ps. 24-27.

2. There is no evidence to support the judgment, and the judgment is contrary to the law and the Decision of the Supreme Court of North Dakota of December 12, 2000, for the following reasons:

A. TAG and Carol have not been paid, despite any assertion in the Appellee's Brief.

A personal check, at best, is only a conditional payment. See, N.D.C.C. § 41-02-59. A dishonored check is not payment, and authorizes the obligee to enforce either the

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STATE OF NORTH DAKOTA
IN THE SUPREME COURT

Matrix Properties Corporation,
formerly known as
E.W. Wylie Corporation
a Minnesota corporation,

Plaintiff-Appellee,

Supreme Court No. 20020026

vs. Civil No. CV-99-02045

TAG Investments, a North
Dakota partnership, and
James A. Grettum, an individual
resident of North Dakota,

Defendants-Appellants.

REPLY BRIEF OF DEFENDANTS-APPELLANTS

APPEAL FROM ORDER OF THE DISTRICT COURT OF CASS COUNTY, DATED NOVEMBER 27, 2001, AND JUDGMENT OF DECEMBER 6, 2001

CASS COUNTY DISTRICT COURT, EAST-CENTRAL JUDICIAL DISTRICT HONORABLE GEORGIA DAWSON

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North Dakota ID #03080

* * *

278, 279 (N.D. 1995) ["If the judgment is void, the court has no discretion to protect it." citing, *First National Bank of Crosby v. Bjorgen*, 389 N.W.2d 789, 793 (N.D.1986). More recently, the North Dakota Supreme Court reiterated that principle of law in *McKenzie County Social Service Board v. C.G.*, 2001 ND 151,¶ 10, 633 N.W.2d 157.

MATRIX provides no guidance as to how the Judgment of September 11, 2001, could be issued by the lower court after (a) creating a novel procedure wherein the lower court refused to consider the only facts submitted to it, failed to make findings of fact, and failed to set forth its conclusions of law as required under Rule 52 of the North Dakota Rules of Civil Procedure, and (b) gave relief that had not been requested in the original Complaint of Matrix Properties Corporation. MATRIX also provides no guidance as to how there can be more than one judgment arising from only one lawsuit. See, N.D.R.Civ.P. 54(b). If possible, it means that the November 2, 1999, Judgment was not a final judgment and Judge Erickson failed to make the "express determination(s)" required by the rule.

MATRIX also fails to provide any guidance as to how it, and the district court, can get around the Fourteenth Amendment's Due Process Clause which prevents the denial to litigants of established adjudicatory procedure. *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971); *Logan v. Zimmerman Brush Co., et al.*, 455 U.S. 422 (1982).

Point 2. As a matter of law, TAG Investments is entitled to full payment of the principal and interest on the monetary amounts awarded it in the November 2, 1999, Judgment.

Once again MATRIX fails to make proper attribution when it makes a statement ["Judge Racek considered Defendant's arguments for interest and rejected them." Brief of

* * *

judgment herein, and the numerous references to Carol Grettum in MATRIX's Brief leads one to believe that the sole purpose of the unprecedented judgment of December 6, 2001, was to attack Carol Grettum's legal title to land after she was denied intervention in this action.

If it is true, as MATRIX now asserts, that "(i)n exercising its option, Matrix created an obligation to make payment to TAG. The trial court specifically found in its January 5 Order that Matrix owed money to TAG and TAG alone. (A. 95-97.)"[8], how can MATRIX seek to uphold this Judgment dated December 6, 2001, which includes reference to Carol Grettum by incorporating the January 5, 2001, Order, now admittedly misleading? Matrix should be reminded that alternative pleadings may be permitted, but judicial estoppel or N.D.C.C. § 31-11-06[9] precludes its actions herein.

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[8] Brief of Plaintiff-Appellee, page 10.

[9] **"31-11-06. Estoppel by declaration, act, or omission**. When a party, by that party's own declaration, act, or omission, intentionally and deliberately has led another to believe a particular thing true and

(Continued on following page)

Point 4. Entry of the December 6, 2001, Judgment is inconsistent with Due Process of Law as expressed in the North Dakota Rules of Civil Procedure.

MATRIX fails to identify the legal procedure permitting the issuance of a *third* judgment involving attorney Spaeth preparing a proposed judgment,[10] sending a letter to the Clerk of Court,[11] a handwritten cryptic note by Judge Dawson authorizing the judgment,[12] and the entry of the judgment as submitted – with no notice of a fact finding hearing ever being served, and without a fact finding hearing ever afforded TAG or GRETTUM. The jurisdictional issue was also raised in that the Supreme Court had jurisdiction stemming from the appeal of the *second* Judgment of September 11, 2001, of this single case. TAG and GRETTUM raised questions involving (a) lack of notice, (b) lack of hearing, (c) lack of resort to N.D.R.Civ.P. 52, 59 or 60, (d) lack of compliance with the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States of America [which prevents the denial to litigants of established adjudicatory procedure. See, *Boddie v. Connecticut*, 410 U.S. 371 (1971); *Logan v. Zimmerman Brush Co., et. al.*, 455 U.S. 422 (1982)], and (e) the void nature of untimely post-judgment orders, that amend final judgments. See also, *Syllabus* 3 of *Cokins v. Frandsen*,136 N.W.2d 377 (N.D.1965).

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to act upon such belief, that party shall not be permitted to falsify it in any litigation arising out of such declaration, act, or omission."

[10] Appendix page 85 through 90.

[11] Appendix page 80.

[12] Appendix page 84.

MATRIX's failure to identify such procedure is because no such legal process exists. The *third* judgment is also void!

Point 5. The December 6, 2001, Judgment awarded Matrix Properties Corporation $75.00 in unauthorized costs for a brief that was not written.

MATRIX's concession that it erred[13] is fitting, but in the process of so conceding it erred three more times: (1) no Supreme Court Order dated February 27, 2001, exists [it was

* * *

[13] Brief of Plaintiff-Appellee, page 11.

OPTION TO PURCHASE

This Agreement (the "Option Agreement") made this 14th day of October, 1996, between TAG INVESTMENTS, a North Dakota partnership, consisting of R. Allan Rostad, Thomas Richards and James A. Grettum, as Optionor (whether one or more) and hereinafter referred to as "TAG" and E.W. WYLIE CORPORATION, a corporation, as Optionee (whether one or more) and hereinafter referred to as "WYLIE" whose post office address is P.O. Box 1188, Fargo, North Dakota 58107-1188.

1. GRANT OF OPTION: For valuable consideration, being the purchase from TAG by WYLIE of other property and other good and valuable consideration, TAG grants this option to WYLIE to purchase the following real property located in the County of Cass and State of North Dakota and fully described as follows:

> All that part of the Southeast Quarter (SE¼) of Section Twenty-two (22), Township One Hundred Thirty-nine (139) North, Range Forty-nine (49) West of the Fifth Principal Meridian, more fully described as follows:
>
> > Beginning at the Northwest Corner of the said SE¼; thence N88°04'18"E along the North line of said SE¼ for a distance of 1758.84 feet; thence S02°14'13"E for a distance of 137.39 feet; thence southwesterly along a circular curve, concave to the northwest, radius of 750.00 feet and an arc length of 613.59 feet; thence S44°38'18"W for a distance of 342.67 feet; thence along a circular curve, concave to the northwest, radius of 1000.00 feet and an arc length of 764.53 feet; thence S88°26'

34"W for a distance of 572.66 feet to a point on the West line of the SE¼; thence N02°23'48"W, along the West line of the SE¼; for a distance of 1191.78 feet to the point of beginning.

[Less the West One Hundred and Twenty feet (W.120') thereof. Said exception being referred to hereinafter as "Street Right-of-Way".]

[Hereinafter referred to as Tract 1]

AND

The East Half of the Southwest Quarter (E¼SW¼) of Section Twenty-two (22) Township One Hundred Thirty-nine (139) North of Range Forty-nine (49) West of the Fifth Principal Meridian.

[Hereinafter referred to as Tract 2]

(Tract 1 and 2 shall be Hereinafter referred to as the "Property" and are illustrated upon attached Exhibit 1)

2. PURCHASE PRICE: The purchase price for the Property, or any portion thereof, shall be the sum of Nine Thousand Three Hundred Seventy-five Dollars ($9,375.00) per acre excluding the right-of-way for 32nd Avenue South, Fargo, North Dakota, the proposed right-of-way for 42nd Street South, (120' wide) Fargo, North Dakota, and a Forty foot (40') strip of land for roadway purposes adjacent to the easterly and southerly border of Tract I (hereinafter referred to as the "40' Strip") that are within the Property, or any portion thereof, individually purchased. All of the streets and roadways referred to herein are illustrated upon attached Exhibit 1. For further identification the 40' strip begins at the Northeast corner of Tract 1 and then

travels in a southerly, southwesterly and westerly direction to the intersection of the illustrated "Future 42nd Street SW." The net acreage for determination of the purchase price of Tract 1 is 35.52 acres and of Tract II is 78.37 acres.

3. TIME: Subject to provision in paragraph Six (6) below, the time for the exercise of this option shall be for the period of time from the date hereof to the 1st of June, 2001, at 5:00 P.M.

4. METHOD OF EXERCISE: Exercise of this option to purchase shall be in writing either delivered to TAG in person or by certified mail prior to the expiration of the time granted by this option as hereinbefore set forth. WYLIE shall have the right to purchase the entire Property or as hereinafter specified portions of the Property (hereinafter referred to as Individual Parcel(s)). The notice(s) to exercise the option may hence pertain to a portion thereof and during the term of this Option Agreement WYLIE may exercise the option as to successive portions of the Property. The notice to exercise this Option Agreement as to an Individual Parcel shall adequately identify the Individual Parcel to be purchased. Following said notice, the area identified will be precisely surveyed for a correct legal description and for determination of the amount of acreage that would determine the purchase price for said Individual Parcel.

5. LOCATION AND SIZE OF INDIVIDUAL PARCELS: The initial Parcel Purchase must be at least 20 acres in size. It can be located anywhere within Tract 1 or Tract 2. Further Individual Parcel(s) purchased must be contiguous to the first Individual Parcel purchased or contiguous to a subsequent Individual Parcel purchased.

6. MINIMUM PURCHASES: The option period stated above is subject to WYLIE purchasing minimum acreage pursuant to the following schedule.

(a) WYLIE must purchase 20 acres on or before June 1, 1999.

(b) A minimum of 40 acres must be purchased on or before June 1, 2000.

7. ADDITIONAL MONIES PAID FOR THIS OPTION OR DURING THIS OPTION:

(a) Option Money to continue the Option Agreement.

i) On or before February 28 of each year during the term of this option, WYLIE must pay as option money to TAG the sum calculated as follows: the price of $9,375.00 multiplied by the acreage included in the Property (exclusive of any right of-way for 32nd Avenue South, proposed 42nd Street South and the 40' strip) which has not yet been deeded prior to the year end, shall be multiplied times the CPI increase for the prior calendar year (1996 to be prorated using September 1, 1996 as the proration date) times 71.40%. This payment is to [sic] referred to as the "Option Money"). It is clearly stated and agreed that the Option Money shall never apply to acreage purchased in the prior year regardless of when in such prior calendar year such purchase occurred.

ii) Failure to remit the above amount within thirty (30) days following written notice by TAG of WYLIE's default in such Option Money payment shall result in the surrender by WYLIE of any further rights pursuant to this Option Agreement.

iii) TAG is responsible for any costs involved in documenting the application of the Consumer Price Index.

iv) "The term "CPI" shall mean the Consumer Price Index for all Urban Consumers published by the U.S. Department of Labor, Bureau of Labor Statistics, for the closest metropolitan area [presumptively Minneapolis], which is published nearest to the adjustment date(s). If the index mentioned herein does not exist or is hereafter altered so as to prevent any increase [or decrease] to be computed, Seller and Buyer shall utilize such other index published by a U.S. Government authority as shall be most similar thereto and consistent with the intent to adjust the parcel purchase price in accordance with changes, if any, in the "cost of living" which has occurred during the applicable period."

(b) Payment of portion of special assessments on 42nd Street South development.

i) On or before February 28 of each year during the term of this option, WYLIE shall pay to TAG any additional installments for special assessments (principal and interest) that might be due on portions of Tract 1 and 2 [that has not been heretofore purchased by WYLIE] as a result of WYLIE's development on 42nd Street South and the 40' strip (hereinafter referred to as Special Assessment Payment). TAG agrees to any deferrals that WYLIE might obtain from the City of Fargo in regard to such Special Assessment.

ii) Failure to remit the above amount within thirty (30) days following written notice by TAG of WYLIE's default in such Special Assessment payment shall result in the surrender by WYLIE

of any further rights pursuant to this option Agreement.

iii) TAG is responsible for any costs involved in documenting any amount owing for Special Assessment Payment.

8. EXECUTION BY CLAPP: The undersigned, Norwest Bank North Dakota, N.A., North Dakota (f/k/a Norwest Capital Management and Trust Co., First Northwestern Trust Co. of North Dakota, and First National Bank and Trust Company of Fargo), as Trustee of the Clapp Land Trust Agreement, created by Margaret C. Schuster, Edwin G. Clapp, Jr., and Dorothy C. King, on October 14, 1976 (herein referred to as "Clapp"), for valuable consideration receipt of which is hereby acknowledged, hereby confirms that TAG presently has valid option rights in effect to purchase all of the property which is the subject matter of this option. Clapp also confirms that said option rights do extend to and through the period in which WYLIE can exercise in whole or in part this option. Clapp further states, however, that the option rights granted TAG depend upon TAG's periodically purchasing portions of the land which is the subject matter of the underlying option. Nevertheless, if for any reason TAG violates the terms of the underlying option between Clapp and TAG, Clapp agrees to acknowledge the option rights granted by TAG to WYLIE by this instrument. Should TAG's option terminate for failure to make the above referenced scheduled purchases or for any other reason, then Clapp [for the valuable consideration herein recited and regardless of whether Clapp receives any of the option Money price herein stated] shall convey the Property or Individual Parcels on the same terms and conditions herein stated directly to WYLIE.

By execution of this Option to Purchase agreement CLAPP also agrees to convey (and TAG agrees that any obligation to it is subject thereto) at the time of closing of the conveyance of any parcel to WYLIE the Street Right-of-Way adjacent thereto with the condition that WYLIE dedicate said Street Right-of-Way for street purposes at the time that, WYLIE plats or subdivides the Property or portion of the Property that is adjacent to said Street Right-of-Way. It is the intent of CLAPP and WYLIE that CLAPP has by executing this option and by actually conveying to WYLIE any Street Right-of-Way made a gift of the Street Right-of-way to the City of Fargo for street purposes. It is further agreed that the value of the Property being conveyed to the WYLIE will be the price paid for the adjacent property on a per acre basis. It is agreed that there is a total of 3.283 acres involved in the Street Right-of-Way but only that portion conveyed in connection with any parcel will be the basis for calculating the value of the individual portion conveyed. It is further agreed by and between CLAPP and WYLIE, however, that the actual timing of the dedication to the City of the Street Right-of-way as part of any plat(s) or subdivision(s) shall be solely the decision and at the discretion of WYLIE.

CLAPP acknowledges valuable consideration of the execution of the deed(s) to the Street Right-of-Way adjacent to any parcel conveyed to WYLIE including but not limited to agreements by WYLIE as to method of development of the Property in regard to the placement of streets.

9. DEVELOPMENT BY WYLIE: It is understood that WYLIE shall have full authority and discretion as to submission to the City of Fargo of plats and application to said City for zoning in regard to any property purchased

pursuant to this option. By executing this Option Agreement Clapp also specifically acknowledges WYLIE's development rights and notwithstanding provisions in Clapp's option with TAG regarding a Master Plan and any right by Clapp to review and approve development plans, that no such authority or right exists as to any portion of the Property sold to WYLIE pursuant to this Option Agreement.

10. CONVEYANCE OF PROPERTY FOR SCHOOL BY CLAPP AND/OR TAG: Clapp and/or TAG reserve the right to convey a parcel not to exceed 10 acres lying within Tract 2 to the West Fargo or the Fargo Public School District for an elementary school. If such conveyance occurs TAG shall refund to WYLIE any monies paid as Option Money attributable to the acreage involved in such conveyance and refund any Street Assessment Payment attributable to the land conveyed for such school purposes.

11. EXECUTION BY GRETTUM: The undersigned JCG Investments, L.L.C., Anderson and Grettum investments, a partnership under the laws of the State of North Dakota, R. Allan Rostad, individually, Thomas Richard, individually and James A. Grettum, individually (hereinafter referred to collectively as "Grettum"), agree to execute such quit claim deeds as WYLIE requires for title purposes to eliminate any title concern involving an interest acquired by Grettum as previous optionees or otherwise in regard to any portion of the Property. Said quit claim deeds at the option of WYLIE shall be delivered either to Clapp onto TAG or directly to WYLIE.

12. PRE-CLOSING ACCESS TO PROPERTY: WYLIE shall have access to the Property during the option period and prior to closing following exercise or partial

exercise of the option for the purposes of conducting any examinations, surveys or tests that WYLIE deems necessary in regard to WYLIE's proposed use of the Property or for hazardous substances that might be located in or upon the Property. WYLIE shall pay all costs and expenses of such investigation and testing and shall hold TAG harmless from all costs and liabilities relating to the WYLIE's activities. WYLIE shall further repair and restore any damage to the Property caused by or occurring during WYLIE's testing and return the Property to substantially the same condition as existed prior to such entry provided WYLIE does not actually purchase any of the Property needing repair or restoration as a result of WYLIE's activities pursuant to this paragraph.

13. ABSTRACT OF TITLE: Within 10 days after WYLIE has exercised its option for the Property or for an Individual Parcel hereinabove provided, TAG shall deliver to WYLIE or WYLIE's attorney, a continued abstract of title for the Property or for such individual Parcel. TAG shall pay the cost of such abstract preparation(s). Said abstract(s) of title shall show TAG's title to be good and marketable subject only to restrictive covenants, mineral reservations and grants and easements of record (provided such are acceptable to Buyer as permitted encumbrances), as well as zoning ordinances and other governmental regulations affecting the Property that would not hinder Buyer's intended use of the Property. WYLIE shall then have fifteen (15) days after continuation of said abstract to examine the title and to accept the same if the title is good and marketable. If the abstract of title fails to disclose the title of TAG to be good and marketable or if there are easements, restrictive covenants or mineral grants and

reservations of record not acceptable to Buyer as permitted encumbrances, or if there are building zoning laws, ordinances or state and/or federal regulations that would hinder Buyer's intended use of the Property, WYLIE, at WYLIE's election, may declare this option and the exercise or partial exercise thereof null and void, or WYLIE may offer TAG a reasonable time (but not more than 120 days) in which to make the title good and marketable or the concerns as to the acceptability of easements, restrictive covenants or mineral grants and reservations of record and building and zoning laws, ordinances and state and federal regulations addressed to Buyer's satisfaction. No objection can be raised, however, for matters stated to be acceptable in paragraph 19 below. If TAG agrees to attempt to cure the defects, TAG shall use due diligence in the effort to do so. If TAG does not undertake to make the title good and marketable and/or acceptable or is unable to make the title good and marketable and/or acceptable within such reasonable time as granted by WYLIE, it shall be at the option of WYLIE either to accept the title in its existing condition with no further obligation on the part of TAG to correct any defect or again have the right to declare its exercise of this option Agreement void as to the Individual Parcel selected or to declare the entire option Agreement void. Any Option Money paid or amount paid for Street Assessment theretofore shall be refunded to WYLIE should WYLIE select the latter option.

14. TERMS OF SALE AND CLOSING: Upon the exercise of this option as to an Individual Parcel and following the examination of the [sic] such Individual Parcel's abstract of title by WYLIE as provided in the preceding paragraph, WYLIE shall duly notify TAG as to the results of such examination. If there are no objections to the title

which require affirmative action by TAG, the closing shall occur within forty-five (45) days of said notice of exercise of this Option Agreement or partial exercise as to an Individual Parcel(s), unless such time shall be extended by the mutual consent of the parties. If there are objections, to the title which can be cured within the period allowed in the preceding paragraph, closing shall occur within five (5) days from the time TAG satisfactorily evidences to WYLIE that the title objections have been duly cured. At the closing, WYLIE shall pay to TAG the purchase price after receiving any due credits as herein provided.

15. CLOSING COSTS: It is specifically acknowledged and agreed that TAG shall pay the following costs and no others connected with the closing of this transaction should the option be exercised:

The cost of continuing or preparing the abstract for WYLIE's initial title examination;

The preparation of the warranty deed; and

The recordation of any instrument required to clear title including but not limited to satisfactions of all prior liens and encumbrances.

The cost of surveying for the legal description of any Individual Parcel designated by WYLIE to be purchased, providing such purchases equal five (5) acres or more or is the last acreage remaining in the specific Tract. Except for such final acreage, any individual parcel designated by WYLIE to be purchased less than five (5) acres shall be paid by WYLIE. In either event, WYLIE may simultaneously request additional surveying services be performed by said surveyor at WYLIE's sole expense.

In addition, real estate commissions, if any, to be paid on this transaction will be paid by the TAG.

16. POSSESSION: Possession shall be delivered to WYLIE on the date of closing.

17. TAXES AND SPECIAL ASSESSMENTS: All taxes and installments for special assessments due in the year of closing and prior years shall be paid by TAG. All taxes and installments for special assessments due in the year after closing shall be pro rated as of the date of closing based upon the taxes payable in the year of closing. Taxes and special assessments due two years after closing shall be paid by WYLIE.

18. FARM INCOME: Farm income payable by the Tenant for the year of closing shall be prorated between TAG and WYLIE to date of Closing.

19. TITLE: A warranty deed conveying merchantable title to the Property shall be executed and delivered by TAG at time of closing. The warranty deed shall be subject, however, to the following exceptions:

a. State and Federal regulations, building and *zoning* laws, and ordinances that would not hinder Buyer's intended use of the Property;

b. The covenants, conditions and restrictions relating to use or improvements of premises, if any. The title has already been reviewed and studied by WYLIE and WYLIE's counsel. No covenants, conditions or restrictions appear at the present time. Therefore, this title concern could not be the basis of any objection or refund of option money as of the date of the abstract continuation, i.e. July 26, 1996, at 7:59 a.m. TAG agrees that no covenants, conditions or restrictions relating to the use of

improvements of the premises have been or will be recorded subsequent to July 26, 1996, at 7:59 a.m. without the express written approval of WYLIE. Clapp also agrees that it will not execute or record any such covenants, conditions or restrictions relating to the use of improvements of the premises from and after said date without the express written consent of WYLIE. Finally it is agreed that the short form option agreement shall contain reference to the requirement that WYLIE consent to any covenant, conditions or restrictions, and;

c. Reservation of any minerals or mineral rights (provided such are acceptable to Buyer as permitted encumbrances);

d. Utility and drainage easements as shown on any plat or subdivision of which the above described Property is a part. The title has already been reviewed and studied by WYLIE and WYLIE's counsel. Therefore, this title concern could not be the basis of an objection or refund of option money as of the date of the abstract continuation, i.e. July 26, 1996, at 7:59 a.m. TAG agrees that no utility or drainage easements have been or will be recorded subsequent to July 26, 1996, at 7:59 a.m. without the express written approval of WYLIE. Clapp also agrees that it will not execute or record any such easements from and after said date without the express written consent of WYLIE. Finally it is agreed that the short form option agreement shall contain reference to the requirement that WYLIE consent to an utility and drainage easement, and;

e. All other easements of record, if any. The title has already been reviewed and studied by WYLIE and WYLIE's counsel. All other easements are in a form acceptable to WYLIE. Therefore, this title concern could

not be the basis of any objection or refund of option money as of the date of the abstract continuation, i.e. July 26, 1996, at 7:59 a.m. TAG agrees that no other easements have been or will be recorded subsequent to July 26, 1996 at 7:59 a.m. without the express written approval of WYLIE. Clapp also agrees that it will not execute or record any such easements from and after said date without the express written consent of WYLIE. Finally it is agreed that the short form option agreement shall contain reference to the requirement that WYLIE consent to any other easements.

20. APPLICATION OR FORFEITURE OF OPTION MONEY: The parties agree that Option Money, if any, shall not be applied to the purchase price at the time of closing. In addition, if WYLIE fails to exercise this option in whole or in part, it shall likewise forfeit the sum paid as Option Money and Street Assessment Payments and such shall be considered liquidated damages to TAG for extending the option to WYLIE. In establishing the amount of Option Money and Street Assessment Payments, if any, paid hereunder and in designating such as liquidated damages and in not applying all of it to the purchase price, the undersigned parties specifically acknowledge that actual damages resulting from WYLIE's failure to purchase or in delaying purchase are impractical or extremely difficult to ascertain. That a reasonable endeavor was made by the parties hereto to fix a fair and reasonable compensation for such failure to purchase or delay in purchasing and that the amount thus established is acknowledged by both parties to bear a reasonable relation to probable damages and is not disproportionate to any damages that could reasonably be anticipated.

21. TIME OF THE ESSENCE: The parties expressly agree that time shall be of the essence in the performance of the parties under this Agreement.

22. GOVERNING LAW: This Agreement shall be construed and interpreted under the laws of the State of North Dakota.

23. NO PARTNERSHIP RELATIONSHIP: Nothing in this Agreement shall in any way or for any purpose cause TAG to become a partner of WYLIE or joint venturer or member of a joint enterprise with WYLIE. The provisions of this Option Agreement to pre-closing rights of WYLIE to partially possess the property are included solely for the purpose of providing WYLIE with adequate information and data upon which to determine if it wishes to exercise the option.

24. BINDING EFFECT: This Agreement shall be binding upon and shall inure to the benefit of each of the parties hereto, their respective heirs, personal representatives, executors, administrators, successors and assigns.

25. SURVIVAL: If this option is exercised and the purchase consummated as herein provided, all of the terms, covenants and conditions of this Option Agreement shall survive and continue in full force and effect after the date of closing.

26. ENTIRE AGREEMENT: This Option Agreement contains the entire agreement between the parties, and neither party has relied upon any verbal or written representations or understandings not set forth herein, whether made by any agent or party hereto.

27. TAG's CONSENT TO TAX FREE EXCHANGE: TAG acknowledges that WYLIE intends the Property or

portion thereof, to be replacement property pursuant to its own established like-kind tax free exchange and TAG to an assignment of this Agreement or Purchase Agreement executed pursuant thereto by WYLIE to a designated qualified intermediary. WYLIE shall be solely responsible for and indemnify TAG against all costs, if any, incurred by TAG or WYLIE attributable to using the Property as replacement property as herein specified.

28. WYLIE's CONSENT TO TAX FREE EXCHANGE: In the event that TAG elects to structure the sale of the Property or portions of it in a manner to qualify as a like-kind tax-free exchange under Section 1031 of the Internal Revenue Code, WYLIE shall consent to qualifying the transaction as a Section 1031 exchange, provided that TAG use a qualified intermediary, that the title to the exchange property(ies) selected by TAG never be conveyed to WYLIE and that TAG shall be solely responsible for and indemnify WYLIE against all costs incurred by WYLIE or TAG attributable to structuring the transaction as a Section 1031 exchange.

29. SHORT FORM OF OPTION: The parties agree that they shall enter into a Short Form Option for the purposes of recording which shall simply recite that Buyer has an option on the Property, the termination date of the option, and shall not recite the option price or other details not pertinent to the matter of notice of Buyer's interest.

30. ASSIGNMENT: WYLIE may assign this option Agreement in whole or in part without the prior written consent of TAG.

IN WITNESS WHEREOF, the parties hereto have caused this instrument to be executed as of the day and year first above written.

TAG INVESTMENTS, a North Dakota partnership consisting of R. Allan Rostad, Thomas Richards and James A. Grettum

/s/ R. Allan Rostad
R. Allan Rostad

/s/ Thomas Richards
Thomas Richards

/s/ James A. Grettum
James A. Grettum

Norwest Bank North Dakota, N.A., North Dakota, a corporation

By /s/ Wendell Herman
Its Vice President

By /s/ _____
Its _____

JCG Investments, L.L.C., a limited liability company

By /s/ James A. Grettum
A Member

Anderson and Grettum Investments, a partnership under the laws of the State of North Dakota

By /s/ James A. Grettum
A general partner

/s/ R. Allan Rostad
R. Allan Rostad, Individually

/s/ Thomas Richards
Thomas Richards, Individually

/s/ James A. Grettum
James A. Grettum, Individually

E.W. Wylie Corporation, a corporation

By /s/ John O. Lyngstad
Its: PRES.

EXHIBIT – Survey illustrating the Property and also illustrating streets and roadways referenced in the Option Agreement – 32nd Avenue Southwest, property 42nd Street Southwest and an 80' roadway the centerline of which following the easterly and southerly border of Tract I.

STATE OF NORTH DAKOTA

COUNTY OF CASS

IN DISTRICT COURT

EAST CENTRAL JUDICIAL DISTRICT

Matrix Properties Corporation, a Minnesota corporation,

Plaintiffs,

vs.

TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota,

Defendants.

Civil No. CV-99-02045

PLAINTIFF'S BRIEF IN SUPPORT OF AMENDED MOTION FOR DAMAGES

INTRODUCTION

Plaintiff Matrix Properties Corporation ("Matrix") respectfully submits this brief in support of its amended Motion for Damages. Matrix seeks damages caused by the refusal of Defendants TAG Investments and James A. Grettum to transfer real estate subject to a 1996 Option agreement between plaintiff and defendants.

In July of 1999, Matrix, as found by Order of the North Dakota Supreme Court, timely and properly exercised its option to purchase 94 acres subject to the 1996 Option Agreement. By contract, the property should have been transferred by August 14, 1999. Defendants refused

to convey the property. Instead, the property was transferred January 5, 2001, by Order of this Court. By statute, plaintiff is entitled to damages for the delay in the transfer of the property from August 15, 1999, to January 4, 2001.

Moreover, after this Court ordered the specific performance of the contract to convey the real estate and after that Judgment was affirmed by the North Dakota Supreme Court, defendants continued to refuse to comply with Court Order and transfer the property. Instead, defendants embarked on a meandering, vexatious, and wasteful process which cost plaintiff tens of thousands of dollars in costs and legal fees **after plaintiff won its judgment in the Supreme Court**. Because all of the claims made by defendants after the Supreme Court entered judgment in April, 2000, were frivolous, vexatious, and intended to delay transfer of the property, plaintiff is entitled to recover all of its costs, and to recover its attorneys' fees incurred after the Supreme Court's Judgment of April, 2000.

STATEMENT OF FACTS

This lawsuit was commenced by Matrix (then known as E.W. Wylie Corporation) in July, 1999, to compel the transfer of real estate subject to a 1996 Option Agreement.

Matrix exercised its option to purchase the 94 acres on July 1, 1999. Pursuant to the terms of the Option Agreement, closing was required to occur within 45 days – by August 14, 1999. Defendants refused to convey at that time. To this date, defendants have refused to convey the property, even after having been specifically ordered to convey the property by this Court. Eventually, on January

5, 2001, the property was judicially transferred by Order of this Court. The North Dakota Supreme Court affirmed that Order by Judgment dated July 13, 2001. The Supreme Court awarded double costs to Matrix, ruling that TAG and Grettum's appeal of the Jan. 5, 2001, Order and all other orders appealed from was frivolous.[1] (Amended Affidavit of Sidney J. Spaeth, Exhibit J) (hereinafter "Spaeth Aff.")

Initially, defendants' refusal to convey the property was based on the argument that Matrix had lost its rights in the underlying Option Agreement by failing to purchase 20 acres by June 1, 1999.

Plaintiff moved immediately for summary judgment, which was granted by the Hon. Ralph Erickson. Defendants appealed and Judge Erickson's Judgment was affirmed by the Supreme Court on April 27, 2000. *Matrix Properties Corp. v. TAG Investments*, 2000 ND 88 (2000). The petition for rehearing was denied.

Upon denial of the petition for rehearing, Matrix contacted defendants and attempted to set up a closing. Defendants responded with a blanket stonewall. Initially, defendants took the startling position that they never

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[1] TAG and Grettum's appeal was all-encompassing. It appealed from "the Order of the District Court of Cass County Dated January 5, 2000; the Order of the District Court of Cass County dated January 5, 2001; and the Order of the District Court of Cass County dated February 16, 2001, and any and all interlocutory Orders or Verbal Orders issued by District Court of Cass County, North Dakota, in November and December, 2000, and January 2001, whether in writing or not." (Spaeth Aff. Ex. K.)

received notice of the July exercise (or any exercise). Defendant Grettum wrote as follows:

> I contacted my other partners to ascertain if either of them had received any written notice "in person or by certified mail prior to the expiration of time granted by (the Option to Purchase dated October 14, 1996)." They each confirmed my own experience – **we have no knowledge of E.W. Wylie Corporation or Matrix Properties Corporation having exercised the option to purchase in writing by personal delivery or certified mail prior to the expiration of times set forth in the option to purchase.**" (Affidavit of Sidney J. Spaeth, Ex. C) (hereinafter "Spaeth Aff.") (emphasis added).

Defendants' startling denial was just the first in a succession of frivolous claims and vexatious motions, appeals, and threats which consumed eight months and numerous trips to the Courthouse, including a bizarre excursion to federal court in which defendants were ordered by U.S. District Court Judge Rodney Webb to pay plaintiff's attorneys' fees.

Defendants' vexatious, wasteful and meandering course of litigation cost Matrix thousands of dollars in costs and tens of thousands of dollars in attorneys's fees, even after Judgment was affirmed by the Supreme Court.

The myriad frivolous claims and positions taken by defendants subsequent to the Supreme Court's April, 2000 ruling are encapsulated in the arguments presented in their last two appeals to the Supreme Court (an intervening appeal having been dismissed). Arguments raised in their second appeal consisted of the following:

THE LOWER COURT DID NOT HAVE JURISDICTION TO GIVE MATRIX PROPERTIES CORPORATION, A MINNESOTA CORPORATION, ANY RELIEF.

THE JUDGMENT OF NOVEMBER 2, 1999, IS A FINAL JUDGMENT THAT CANNOT BE AMENDED WITHOUT COMPLIANCE WITH RULES 52, 59 OR 60 OF THE NORTH DAKOTA RULES OF CIVIL PROCEDURE.

THE NORTH DAKOTA RULES OF CIVIL PROCEDURE WERE NOT FOLLOWED BY MATRIX PROPERTIES CORPORATION AND THE DISTRICT COURT HAD NO AUTHORITY TO HEAR THE MOTION.

MATRIX PROPERTIES CORPORATION'S MOTION WAS AN ACTION SEEKING A DECLARATORY JUDGMENT WITHOUT COMPLIANCE WITH APPROPRIATE RULES OR STATUTES.

INSTEAD OF BRINGING A POST-JUDGMENT MOTION, MATRIX PROPERTIES CORPORATION SHOULD HAVE STARTED EITHER A DECLARATORY ACTION OR AN ACTION FOR SPECIFIC PERFORMANCE FOR MATTERS THAT OCCURRED POST-JUDGMENT.

MATRIX PROPERTIES CORPORATION DID NOT COMPLY WITH THE OPTION TO PURCHASE AND ANY PROPOSAL SUBSEQUENT TO NOVEMBER 2, 1999, AND ANY PROPOSAL MADE BY MATRIX PROPERTIES CORPORATION WAS A COUNTERPROPOSAL WHICH WAS REJECTED.

MATRIX PROPERTIES CORPORATION'S INTERPRETATION OF PARAGRAPH 7(a) IS NOT

CONSISTENT WITH THE INTENT OF THE PARTIES NOR THE TERMS OF THE OPTION.

MATRIX PROPERTIES CORPORATION IS IN DEFAULT UNDER THE TERMS OF THE OPTION.

(Spaeth Aff. Ex. D.)

Arguments raised in their fourth appeal consisted of the following:

Neither The District Court nor Judge Racek Had Jurisdiction to Issue Any of the Orders That are on Appeal.

TAG Investments and James A. Grettum Were Denied Due Process of Law and Equal Protection of the Laws.

Matrix Properties Corporation Has Abandoned Its Contract and Forfeited Its Right to Specific Performance.

Judge Racek's Order Deviated From the Two Mandates of the Supreme Court of North Dakota [One Even Prematurely].

Carol Grettum's Property Should Not Have Been Taken by the Court.

(Spaeth Aff. Ex. L.)

In both instances, the Supreme Court ruled the appeals – and the arguments presented by appellants in those appeals – were frivolous. (Spaeth Aff. Ex. J.)

In addition to the filing of these frivolous claims, defendants also abused the judicial system by secretly transferring some of the property to Mr. Grettum's wife, recording the transfer only after the Supreme Court

rejected defendants' appeal. After Judge Erickson granted summary judgment and during defendants' first appeal, counsel for defendants suggested to counsel for plaintiff that no supersedeas bond was required because the Notice of Lis Pendens provided security to plaintiff against any potential transfers by defendants.

In a letter dated November 29, 1999, counsel for defendants stated that defendants "desire a speedy resolution of this matter on appeal" and requested that the parties merely wait the outcome of the appeal. The letter continued:

> My clients have no intention to sell any of the property during the course of their appeal. The Lis Pendens that is already placed of record is added protection to any right that your client may have in that regard.

(Spaeth Aff. Ex. E.)

Despite their counsel's assurances to the contrary, defendants secretly transferred a portion of the property on January 26, 2000, to Carol Grettum, James Grettum's wife. This transfer was not recorded until May, 2000, shortly after this Court affirmed the summary judgment in favor of Matrix. (Spaeth Aff. Ex. F.) In subsequent actions – and again contrary to the earlier assertions of their counsel – defendants took the position that the transfer to Carol Grettum was not subject to the Notice of Lis Pendens.

In addition, defendants have refused to provide quit claim deeds from various signatories to the 1996 Option Agreement as required by that contract. This refusal has caused Matrix to incur additional costs, fees and delays in quieting title to the real estate. Two of these entities –

JCG Investments and Anderson and Grettum Investments – are controlled by Defendant James A. Grettum. Each of the parties contractually obligated to provide quit claim deeds pursuant to the contract are represented by counsel for Grettum and TAG.

Finally, defendants and their counsel have consistently impugned the integrity of this Court, the North Dakota Supreme Court, plaintiff, and plaintiff's counsel. Defendants' scurrilous accusations culminated in a January 5, 2001, hearing in which defendants even impugned Court staff, arriving with their own court reporter because they did not want to implicate any more state actors in this imagined conspiracy being perpetrated against defendants.

In sum, defendants have deliberately delayed transfer of the property through a vexatious campaign of deceit, scurrility, and frivolous claims and appeals. The North Dakota Supreme Court twice has ruled that defendants' claims were frivolous. It is the law of this case. Plaintiff is entitled to its damages.

ARGUMENT

1. Matrix is Entitled to its Litigation Costs.

The North Dakota Century Code provides that damages will be assessed against a party which wrongfully delays the transfer of real property. N.D.C.C. § 32-03-21. *See also Bumann v. Maurer*, 203 N.W.2d 434, 439 (N.D. 1972) ("delay in the performance of an agreement to convey can be the root of special as well as general damages.").

Section 32-03-21 provides:

> The detriment caused by the wrongful occupation of real property in cases not embraced in sections 32-03-22, 32-03-27, 32-03-28, and 32-03-29 is deemed to be the value of the use of the property for the time of such occupation; not exceeding six years next preceding the commencement of the action or proceeding to enforce the right to damages and the costs, if any, of recovering the possession.

N.D.C.C. § 32-03-21.

Even more specifically, Section 28-26-07 requires that "costs must be allowed to the plaintiff upon a recovery . . . when a claim of title to real property arises on the pleadings." N.D.C.C. § 28-26-07.

North Dakota law explicitly provides for the recovery by Matrix of the costs of recovering possession of the property. At a minimum, these costs include the litigation costs incurred by plaintiff in pursuing this action. Those costs which have not yet been taxed against the defendants total $4,127.60. (Spaeth Aff., ¶3, Ex. A.)

2. Matrix is Entitled to Its Attorneys' Fees Incurred After the Supreme Court Affirmed Judgment in April, 2000.

Under North Dakota law, "costs and attorney fees must be awarded if it is found that a claim is frivolous." *Jensen v. Zuern*, 523 N.W.2d 388, 389 (N.D. 1994) (citing N.D.C.C. § 28026-01(2). The Supreme Court has ruled that all claims raised by defendants in their last two appeals of the post-appeal matters starting in May, 2000 – the same arguments that were raised at the trial court level – were

frivolous. The U.S. District Court for the District of North Dakota awarded plaintiff its attorneys' fees for opposing the attempted removal to federal court. In sum, all of defendants claims and actions subsequent to the affirmance of the trial court's judgment by the North Dakota Supreme Court were frivolous.

Upon a finding that claims are frivolous, the prevailing party is entitled to its attorneys' fees. *Jensen v. Zuern*, 523 N.W.2d at 389; N.D.C.C. § 28-26-01(2). Each of the arguments and claims raised by defendants subsequent to the Supreme Court's affirmance of the Judgment in April, 2000 were frivolous. (Spaeth Aff. Exs. G, H and L.) Copies of the Supreme Court's Opinion and Judgment awarding double costs for the filing of a frivolous appeal are attached as Exhibit H to the Spaeth Affidavit. A copy of Judge Webb's Memorandum and Order awarding attorneys' fees to plaintiff is attached as Exhibit G to the Spaeth Affidavit. Copies of the Supreme Court's Opinion and Judgment awarding double costs for the filing of a frivolous appeal are attached as Exhibit L to the Spaeth Affidavit.

It is the law of this case that the claims made by defendants subsequent to the Supreme Court's affirmance of the November 1999 Judgment are frivolous. As a result, plaintiff is entitled as of right to its attorneys' fees. Those fees which have not yet been taxed against the defendants total $48,642. (Spaeth Aff. ¶ 4, Ex. B)

3. Matrix is Entitled to Damages for Loss of Use of the Property.

As noted above, Section 32-03-21 provides that damages will be assessed against a party which wrongfully

delays the transfer of real property, and that those damages include "the value of the use of the property for the time of such occupation." N.D.C.C. § 32-03-21; *Bumann*, 203 N.W.2d at 439.

For nearly 18 months, plaintiff was deprived of possession and the ability to develop the property. The North Dakota Supreme Court has ruled that, in addition to the remedy of specific performance, a vendee in a specific performance action may also be awarded damages for the delay in transferring the property. *Orfield v. Harney*, 157 N.W. 124, 127 (N.D. 1916); *Beddow v. Flage*, 132 N.W. 637, 640 (N.D. 1911).

In takings and eminent domain cases, just compensation has been defined by both the United States and North Dakota Supreme Courts as including interest from the time of the taking. *E.g., United States v. Klamath and Moaduc Tribes*, 304 U.S. 119, 123 (1938); *Donaldson v. Bismarck*, 71 N.D. 592, 3 N.W.2d 808, 819 (1942).

The object of the court "is to place the party without fault as nearly as possible in the same condition as he would have been in had there been no default by the other party." *Orfield*, 157 N.W. at 127. In this case, plaintiff is entitled to a reasonable rate of interest, for the period from August 15, 1999, the latest date closing could have occurred under the contract, until January 5, 2001, the date of closing.

This is the valuation suggested by defendants themselves. In seeking to thwart closing on January 5, 2001, defendants argued that they should be compensated for the delay in receiving the purchase price during that same period. Having established the formula for determining the rate of interest and the amount of damages to the

damaged party, defendants cannot now be heard to claim that this measure of damages is not appropriate.

Plaintiff suggests the Court determine plaintiff's damages for loss of use of the property to plaintiff by following the formula suggested by defendants. Because the parties had agreed in the contract on a valuation for the property, the value of the land (vis-a-vis the plaintiff and defendant) is an undisputed, liquidated value. Therefore, it makes no difference that defendants were seeking interest on a cash sum, while plaintiff seeks interest on an established and agreed-upon land value. The value is the same.[2]

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[2] Judge Racek rejected defendants' contention that defendants were entitled to interest on the purchase money caused by defendants' own delay in closing. When a seller remains in the possession of the property and enjoys the use and benefit of the land throughout the entire period, the seller is not entitled to interest. *See Rights as Between Vendor and Vendee under Land Contract in Respect of Interest*, 25 A.L.R.2d 951, § 4. This is so because awarding defendants interest would enable defendants to have use and enjoyment of the property, pocket all income received from the property, and receive interest payments from the plaintiff. Meanwhile, plaintiff – which lacks possession through no fault of its own – would have to pay interest on land it did not have. In other words, if defendants were paid interest, they would be entitled to (1) possession of the property, (2) income from the property, and (3) interest on the purchase price during the period they benefitted from refusing to convey the land – classic and unabashed triple dipping, which is unsupported in either law or equity. This result is particularly inequitable in situations such as this case where the vendor is to blame for the delay in the transfer.

"[N]either party should be able to enjoy both the beneficial use of the property and the use of the purchase money without being held accountable in some manner to the other party. If the vendor is in possession, receiving the rents and profits from the land, he may be

(Continued on following page)

A copy of defendants' formula for determining damages occasioned by the delay in closing is attached as Exhibit I to the Spaeth Affidavit. Defendants suggested a rate of interest of 6 percent from August 15, 1999 to the date of entry of judgment on November 1, 1999, and at the post-judgment interest rate of 12 percent from November 1, 1999, to the date of closing on January 5, 2001.

By suggesting this exact measure of damages, defendants cannot now argue that such a theory is not cognizable under the law. Under similar facts, the New York Court of Appeals ruled that a wrongful vendor who had agreed upon a reasonable rate of interest on the value of real estate as the proper measure of damages for delay in transfer, could not be heard to argue later that such measure was not appropriate.

In *Freidus v. Eisenberg*, 529 N.Y.S.2d 69, 69 (N.Y. 1988), a vendee was awarded specific performance of a contract to convey property. The trial court subsequently awarded the vendee a reasonable rate of interest on the land value for damages caused by the delay in transferring the property. *Freidus v. Eisenberg,* 510 N.Y.S.2d 139, 141-142 (N.Y. App. Div. 1986), *mod'd*, 529 N.Y.S.2d at 69.

The intermediate appellate court vacated that portion of the trial court judgment awarding damages based upon a reasonable rate of interest. *Id.* at 146. Despite its vacation of the interest award, the Supreme Court wrote:

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denied interest on the purchase money." 25 A.L.R.2d 951 at § 1 (citing cases).

> Here, with specific performance granted, the contract is being performed, and the purchaser has not lost the value of the bargain. Although legal damages are therefore inappropriate, equity will, so far as possible, place the parties in the same situation as they would have been in if the contract had been performed according to its terms. To achieve that end, the court will award to the purchaser, in addition to specific performance of the contract, such items of damage as naturally flow from the breach, are within the contemplation of the parties, and can be proven to a reasonable degree of certainty.

Id. at 142.

The New York Court of Appeals reinstated the trial court's award of damages based upon a reasonable rate of interest, ruling that the seller had agreed to that theory as a valid theory for measuring the damages and was precluded from arguing that the theory was not cognizable under the law. *Freidus*, 529 N.Y.S.2d at 69. "It is well settled that parties to a civil litigation, in the absence of a strong countervailing public policy, may consent, formally or by their conduct, to the law to be applied.") *Id.* (citations and quotations omitted).

In this instance, defendants themselves offered this method of valuating damages. They claimed entitlement to this measure of damages and cannot be heard now to claim that plaintiff is not entitled to an equal measure of damages. The contract set a firm price for the real estate so the value of the property is undisputed and in a liquidated amount. Therefore, it is irrelevant that defendants were seeking interest on a cash sum, while plaintiff is seeking interest on a liquidated land value.

Defendants' own calculations set forth the following measure of damages. Pursuant to contract, the parties agreed that the value of the land upon the closing of the sale would be $9,375 an acre, or $880,218.75 for the 93.89 acres at issue. Defendants calculated a rate of interest of 6 percent for 79 days, totaling $11,430.79, and a rate of interest of 12 percent for 430 days, totaling 124,436.40.

Therefore, as a result of defendants' own calculations, a reasonable rate of interest for the 509-day delay in transferring the property is $135,867.19. Because this is the proper measure of damages suggested by defendants, they cannot argue that it is not an appropriate measure of damages for plaintiff's loss of use. *See Freidus*, 529 N.Y.S.2d at 69.

CONCLUSION

For all of the foregoing reasons, Plaintiff Matrix Properties Corporation respectfully requests an Order granting its damages for plaintiff's litigation costs in the sum of $4,127.60; for plaintiff's attorneys fees subsequent to April, 2000, in the amount of $48,642, and for damages for loss of use of the property in the amount of **$135,867.19**.

Dated: July 30, 2001.

Respectfully submitted,

VOGEL, WEIR, HUNKE & McCORMICK, LTD.

BY: /s/ Sidney J. Spaeth
Sidney J. Spaeth (#04909)
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P.O. Box 1389
Fargo, ND 58107-1389
(701) 237-6983
Attorneys for Plaintiff
Matrix Properties Corporation

STATE OF NORTH DAKOTA	IN DISTRICT COURT
COUNTY OF CASS	EAST CENTRAL JUDICIAL DISTRICT
Matrix Properties Corporation, a Minnesota corporation, Plaintiffs, vs. TAG Investments, a North Dakota partnership; and James A. Grettum, an individual resident of North Dakota, Defendants.	Civil No. CV-99-02045 **AMENDED AFFIDAVIT OF SIDNEY J. SPAETH**

STATE OF NORTH DAKOTA)
) ss
COUNTY OF CASS)

Sidney J. Spaeth, being duly sworn under oath, states as follows:

1. I am attorney for Plaintiff Matrix Properties Corporation and submit this amended affidavit in support of Plaintiff's Amended Motion for Damages in the above-referenced matter.

2. I have reviewed the billing statements of this firm reflecting the fees and costs incurred in litigating this matter.

3. Excluding costs which have already been taxed against defendants, Plaintiff has incurred costs in the total amount of 4,127.60. Those costs are set forth in Exhibit A to this affidavit.

4. Subsequent to the Supreme Court's affirmance of the trial court's judgment in April 2000 and exclusive of fees awarded as damages by the U.S. District Court, Plaintiff has incurred attorneys' fees in the total amount of $48,642. These fees are set forth in Exhibit B to this affidavit.

5. Attached hereto as Exhibit C is a true and correct copy of a letter dated June 6, 2000 from James A. Grettum to Matrix Properties Corporation.

6. Attached hereto as Exhibit D is a true and correct copy of the cover page and Table of Contents for Brief of Defendants-Appellants in an Appeal from a Post Judgment Order Dated June 26, 2000.

7. Attached hereto as Exhibit E is a true and correct copy of a letter dated November 29, 1999 from David Garaas to Daniel Bueide.

8. Attached hereto as Exhibit F is a true and correct copy of an abstract of title number 47627.

9. Attached hereto as Exhibit G is a true and correct copy of a Memorandum and Order in *Matrix Properties Corporation v. TAG Investments*, number A3-00-167 (D. N.D. December 21, 2000).

10. Attached hereto as Exhibit H are true and correct copies of the Opinion and Judgment of the North Dakota Supreme Court dated December 12, 2000.

11. Attached hereto as Exhibit I is a true and correct copy of Defendants' payment calculations.

12. Attached hereto as Exhibit J are true and correct copies of the Opinion and Judgment of the North Dakota Supreme Court dated July 13, 2001.

13. Attached hereto as Exhibit K is a true and correct copy of Defendants' Notice of Appeal dated February 26, 2001.

14. Attached hereto as Exhibit L are true and correct copies of the cover and table of contents of Defendants' Appellate Brief.

Further Affiant sayeth not.

Dated this 30th day of July, 2001.

/s/ Sidney J. Spaeth
Sidney J. Spaeth

Subscribed and sworn to before me this 30th day of July, 2001.

(SEAL) JESSICA NELSON
Notary Public
State of North Dakota
My Commission Expires
Nov. 13, 2006

/s/ Jessica Nelson
Notary Public

EXHIBIT A

Costs

10/14/099	Westlaw Computer Research (9/20/99)	154.13
11/02/99	Hand delivery to Jonathan Garaas	5.00
11/02/99	Pick up signed Judgment at Cass County Court	5.00
11/02/99	Hand delivery to Cass County Clerk of Courts	5.00

11/11/99	Hand delivery to Rob Lyngstad at E.W. Wylie	5.00
12/06/99	Hand delivery to Jonathan Garaas	5.00
12/16/99	Westlaw Computer Research (11/2/99)	413.14
12/18/99	Hand delivery to David Garaas	5.00
12/20/99	Hand delivery to David Garaas	5.00
12/21/99	Telefax a@ 1.00/page to David Garaas	30.00
12/21/99	Hand delivery to David Garaas	5.00
12/21/99	Hand delivery to David Garaas	5.00
1/10/00	Xerox copies @ $.15/page	90.45
1/31/00	Westlaw Computer Research (12/3/99, 12/6/99, 12/16/99, 12/23/99)	939.99
2/3/00	Xerox Copies @ .15/page	18.15
2/14/00	Telefax @ 1.00/page to Rob Lyngstad	32.00
2/16/00	Westlaw Computer Research (1/31/00)	86.54
2/29/00	Xerox copies @ $.15/page	72.30
3/20/00	Westlaw Computer Research (2/2/00, 2/8/00, 2/22/00, 2/24/00)	374.03
8/10/00	Westlaw Computer Research (FF) (6/26/0, 6/28/00)	33.22
9/19/00	Cass County Clerk of District Court, Transcript	55.00
9/22/00	Express Press, Copies	717.09
10/9/00	Express Press, Copies	3.05

11/6/00	Sid Spaeth, Prorata Shre of Meals & Mileage to Bismarck, ND, November 2	67.13
11/15/00	Tia Mahler, Transcripts	69.87
12/20/00	Wendell D. Herman, Witness Fee	45.00
12/26/00	Cass County Clerk of District Court, Copy of Order	1.00
12/28/00	Edwin "Ned" Clapp, Subpoena	45.00
1/15/01	Mathison Company, Photo Enlargement	18.64
1/22/01	Cass County Abstract Company, Name Search & Bankruptcy Search	216.00
1/29/01	Westlaw Computer Research (12/14/00) MTA (12/6/00, 12/7/00) CMB (12/18/00, 12/20/00, 12/21/00, 12/22/00)	582.37
2/02/01	Clerk of U.S. District Court-Fargo, Certified Copy of Judgment	7.50
2/08/01	Cass County Clerk of District Court, Filing Fee	10.00
2/27/01	Cass County Clerk of District Court, Copy of Order	1.00
	TOTAL COSTS	**$4,127.60**

EXHIBIT B

Fees

5/5/00	SJS	Review TAG motion and brief re: transcript.	0.2	$	30.00
5/8/00	SJS	Research rehearing requirements	0.2	$	30.00
5/9/00	DAB	Telephone conference Garaases. Office conference Sid Spaeth, prepare memo to file	0.5	$	80.00
5/11/00	SJS	Review petition for rehearing; draft letter to client.	0.4	$	60.00
5/15/00	JRB	Telephone call from and to client	0.1	$	16.00
	SJS	Review court order	0.1	$	15.00
	DAB	Telephone conference Rob, review deed from James to Carol, review survey, office conference MMB.	0.5	$	80.00
6/1/00	SJS	Review order; telephone conference with client; conference with D. Bueide re: closing and litigation strategy; telephone conference with Court clerk (2); research effect of lis pendens	3.4	$	510.00
6/2/0	SJS	Review letter from Garaas; research effect of judgment and lis pendens	2.3	$	345.00

	DAB	Office conferences SJS, prepare and revise correspondence Garaas, prepare and revise correspondence Norwest, review and revise closing documents to be delivered by seller.	3.5	$	560.00
6/5/00	SJS	Research privity of spouse for res judicata	0.4	$	60.00
6/7/00	SJS	Telephone conference with R. Lyngstad; review correspondence from J. Grettum; draft letter to J. Garaas.	0.9	$	135.00
6/12/00	SJS	Review correspondence from D. Garaas; telephone conference with D. Bueide; research and draft brief to declare no option money due	4.2	$	630.00
	DAB	Review Grettum correspondence, review option, office conference with Sid Spaeth regarding latest TAG correspondence and next action.	2.1	$	336.00
6/13/00	SJS	Draft notice of motion and motion; draft Sid Spaeth affidavit; draft proposed order; research, draft, revise, serve and file brief	5.1	$	765.00
6/13/01	DAB	Review and mark up motion pleadings, telephone conference Rob.	0.9	$	144.00
6/14/00	DAB	Prepare correspondence Garaases	0.3	$	48.00

6/19/00	SJS	Draft letter to J. Garaas.	0.3	$	45.00
6/20/00	SJS	Conference with D. Bueide; research quiet title requirements.	1.0	$	150.00
	DAB	Office conferences Sid Spaeth regarding Order for Transfer.	0.2	$	32.00
6/21/00	SJS	Review TAG brief; telephone conference with R. Lyngstad; conference with D. Bueide.	1.0	$	150.00
6/22/00	SJS	Prepare for and attend hearing and declaration of contract term.	3.3	$	495.00
6/23/00	SJS	Conference with D. Bueide; draft brief to compel transfer.	1.0	$	150.00
6/26/00	SJS	Research and draft brief in support of motion to compel transfer	3.0	$	450.00
	JRB	Conference with Dan Bueide regarding quiet title action to resolve Clapp interests etc.	0.9	$	144.00
6/27/00	SJS	Draft order; research and draft brief to compel deeds; telephone conference with Bueide; conference with J. Brakke; review memo from F. Fairchild.	5.0	$	750.00
6/28/00	CLK	Draft argument for brief on covenant of good faith.	3.0	$	225.00

	SJS	Revise and edit brief.	0.5	$	75.00
6/30/00	SJS	Draft motion; draft and revise brief.	2.7	$	405.00
	DAB	Review Brief and Order, review underlying option.	1.2	$	192.00
7/5/00	SJS	Revise, edit, serve and file motion and brief, review TAG appeal; telephone conference with calendar clerk.	3.3	$	495.00
	DAB	Review and revise brief and order, review Clapp and TAG options, prepare exhibits for order.	3.2	$	544.00
	MB	Review closing transcript; Draft letter forwarding same to client.	0.3	$	24.00
7/14/00	SJS	Telephone conference with R. Lyngstad.	0.2	$	30.00
7/17/00	SJS	Review TAG brief and filing; review correspondence from Supreme Court; telephone conference with Clerk of Supreme Court; draft motion and brief to dismiss appeal; draft reply brief on transfer.	3.5	$	525.00
7/18/00	SJS	Draft, revise, serve and file reply brief; draft, revise, serve and file motion to dismiss; prepare for hearing.	3.3	$	495.00
	DAB	Office conferences Sid Spaeth	0.3	$	51.00

7/19/00	SJS	Prepare for and attend hearing to compel transfer	2.4	$	360.00
	DAB	Prepare for and attend hearing	1.4	$	238.00
	MB	Review tract index at Cass County Register of Deed's office to determine conveyances since 5/3/00	0.5	$	40.00
7/31/00	SJS	Review TAG brief	0.6	$	90.00
8/9/00	SJS	Review correspondence from court.	0.2	$	34.00
8/14/00	SJS	Review Supreme Court Order; conference with J. Brakke; draft letter to client; research motion for supervisory writ.	0.6	$	102.00
8/15/00	SJS	Conference with M. McCormick and B. Quick re: motion for supervisory writ.	0.2	$	34.00
8/21/00	SJS	Review transcript of hearing; review new case on effect of judgments; conference with D. Bueide re: effect of filing option.	1.1	$	187.00
8/23/00	SJS	Telephone conference with R. Lyngstad.	0.2	$	34.00
8/24/00	JRB	Conference with client.	1.2	$	204.00
	SJS	Conference with J. Brakke, J. Lyngstad and R. Lyngstad; research filing of supervisory writ.	1.3	$	221.00

8/28/00	SJS	Research and draft brief for supervisory writ.	2.7	$	459.00
8/29/00	SJS	Research and draft brief for supervisory writ.	5.1	$	867.00
8/30/00	SJS	Draft Brief.	3.5	$	595.00
8/31/00	SJS	Revise and edit brief; draft motion and affidavit; serve and file	3.2	$	544.00
	DAB	Review and mark up brief for Supreme Court.	0.5	$	85.00
9/6/00	SJS	Review court order; draft letter to client.	0.1	$	17.00
9/12/00	SJS	Review TAG response to motion for supervisory writ and affidavit; telephone conference with client.	1.5	$	255.00
9/16/00	SJS	Review order from Supreme Court.	0.2	$	34.00
9/19/00	SJS	Arrange service and filing to supreme court; review transcript.	0.3	$	51.00
9/29/00	SJS	Review court order; telephone conference with client; telephone conference with court administrator.	0.5	$	85.00
10/2/00	SJS	Review TAG brief.	0.8	$	136.00
10/3/00	SJS	Research and draft appellate brief on option money.	4.1	$	697.00
10/4/00	SJS	Research and draft appellate brief.	5.1	$	867.00

10/10/00	SJS	Edit, serve and file brief; telephone conference with J. Garaas; draft letter to J. Garaas.	0.8	$	136.00
10/13/00	SJS	Review correspondence from Supreme Court; draft letter to Supreme Court.	0.2	$	34.00
10/18/00	SJS	Revise motion, brief and proposed order for transfer of deeds.	0.9	$	153.00
10/23/00	SJS	Review and revise motion papers on transfer; arrange service and filing	0.9	$	153.00
	DAB	Telephone conferences Wendy, prepare exhibits to Order.	1.4	$	238.00
10/27/00	SJS	Review TAG reply brief.	0.6	$	102.00
11/1/00	SJS	Prepare for Supreme Court Argument.	1.4	$	238.00
11/2/00	SJS	Travel to and from Bismarck; attend oral argument.	9.1	$	1,547.00
11/3/00	SJS	Telephone conference with R. Lyngstad.	0.2	$	34.00
11/6/00	SJS	Review TAG brief.	1.6	$	272.00
11/7/00	SJS	Prepare for and attend hearing on transfer of deeds; amend proposed order.	4.3	$	731.00
	DAB	Review defendant's brief, prepare for and attend hearing.	2.9	$	493.00

11/8/00	SJS	Review proposed order; telephone conference with R. Lyngstad; draft letters to court; to J. Garaas; to court regarding wire transfer.	1.0	$	170.00
	DAB	Conference Rob and John.	0.8	$	136.00
11/14/00	DAB	Telephone conference Rob, office conference MMB regarding tract search, telephone conferences Wendy, telephone conference John.	1.0	$	170.00
11/15/00	SJS	Review correspondence from J. Garaas; regarding closing; telephone conference with R. Lyngstad.	0.7	$	119.00
	MB	Travel to Cass County Register of Deed's Office to review tract index.	0.7	$	56.00
	DAB	Telephone conference Rob, telephone conference Wendy, office conference MMB, prepare for and attend "closing"	1.6	$	272.00
11/16/00	SJS	Review TAG motion papers to Supreme Court and transcript.	1.2	$	204.00
11/17/00	SJS	Telephone conference with court; revise order.	0.5	$	85.00
11/21/00	SJS	Draft proposed order.	0.8	$	136.00
11/22/00	SJS	Draft serve and file motion, brief and affidavit and proposed order.	3.8	$	646.00

	DAB	Revise Order, telephone conferences Title Company.	1.1	$	187.00
11/27/00	SJS	Review Supreme Court Order; draft letter to client.	0.2	$	34.00
12/6/00	DAB	Office conferences Sid Spaeth, telephone conference Title Company, review closing statements.	0.5	$	85.00
12/12/00	DAB	Office conferences Sid Spaeth re: upcoming hearing, office conference Jon Brakke re: upcoming hearing, review Order.	1.4	$	238.00
12/13/00	DAB	Office conference Jon Brakke, office conferences Sid Spaeth, revise Proposed Order, all re: Lis Pendens.	0.5	$	85.00
12/15/00	DAB	Telephone conference Wendell Herman, attend hearing, telephone conferences Ned, office conferences Sid Spaeth re: judicial closing.	3.1	$	527.00
	CMB	Meeting with Sid Spaeth regarding research project on notice of lis pendens.	0.4	$	40.00
12/17/00	CMB	Research notice of lis pendens statute in North Dakota.	0.6	$	60.00

12/18/99	SJS	Draft, serve and file petition for costs and fees, affidavit of proposed order; review defendants' appeal draft letter to client.	1.6	$	272.00
	DAB	Telephone conference client, office conferences Sid Spaeth re: judicial closing, revise Order, review Lis pendens cases, office conference CMB	0.7	$	119.00
	CMB	Regarding Grettum case. Research and update memo to Sid Spaeth for the notice of lis pendens issue.	0.8	$	80.00
12/19/00	SJS	Telephone conference with LAP regarding subpoenas; draft and revise subpoenas; conference with G. Schmitt regarding hearings; draft notice of hearings.	2.9	$	493.00
	DAB	Telephone conferences Ned, office conferences Sid Spaeth and John Brakke re: Lis Pendens and trust participation, prepare legal description.	1.4	$	238.00
12/20/00	CMB	Research for brief in support of transfer of Carol Grettum's land.	3.3	$	330.00

	SJS	Revise subpoenas and arrange service and filing; draft and revise proposed order and arrange service and filing; draft letter to J. Garaas regarding subpoenas; telephone conference with J. Lyngstad; conference with Dan Bueide.	1.6	$ 272.00
	DAB	Telephone conference client, office conferences Sid Spaeth re: subpoenas, revise subpoena, review underlying option, continue preparing legals for TAG and Carol parcels.	2.9	$ 493.00
	CMB	Review and Keycite brief regarding transfer of Carol Grettum's property	0.4	$ 40.00
12/21/00	CMB	Research and draft brief for transfer of property from Carol Grettum to Matrix.	5.7	$ 570.00
	SJS	Draft revise and edit brief on lis pendens; arrange service and filing; telephone conference with J. Lyngstad; draft letter to J. Garaas; telephone conference with J. Garaas.	0.4	68.00
	DAB	Review and revise Lis Pendens Brief, conference clients, office conference Sid Spaeth re: possibly subpoenaing Ned and Carol, prepare deeds and closing road map.	1.9	$ 323.00

12/22/00 SJS	Draft revise and edit brief on lis pendens; arrange service and filing; telephone conference with J. Lyngstad; draft letter to J. Garass; telephone conference with J. Garass.	1.9	$	323.00
12/26/00 SJS	Review memorandum opinion from Judge Webb; review petition for rehearing; draft letter to client; telephone conference with client.	0.7	$	119.00
12/28/00 SJS	Review correspondence from Supreme Court; telephone conference with M. Thomas and Dan Bueide regarding Herman subpoena; draft Ned Clapp subpoena and subpoena duces tecum; arrange service on Ned Clapp.	0.9	$	153.00
DAB	Telephone conferences Mike Thomas re: subpoena, telephone conference Ned re: subpoena, office conferences Sid Spaeth re: subpoenas for Ned.	1.3	$	221.00
12/29/00 SJS	Telephone conference with counsel for Ned Clapp; review TAG's response to brief on lis pendens; conference with client.	2.2	$	374.00

	DAB	Telephone conferences Mr. Turman, conference clients, office conferences Sid Speth re: underlying option, review underlying option.	3.1	$	527.00
1/02/01	SJS	Review TAG response to request for damages; prepare for and attend status conference.	2.6	$	442.00
1/02/01	DAB	Prepare many Orders and Deeds for judicial closing, telephone conference Joe Turman, office conferences Sid Spaeth, prepare for and attend scheduling conference, office conference MMB regarding title search, telephone conferences Title Company regarding closing matter, review real estate tax information	6.6	$	1,122.00
1/03/01	DAB	Office conferences Sid Spaeth re: Order, telephone conference Mike Thomas, telephone conference Joe Turman, prepare Orders and Deeds.	3.2	$	544.00
1/04/01	SJS	Review Tag's calculations; research and draft letter brief re: entitlement to interest for vendor in possession; review proposed order & warranty deed; arrange service & filing of letter brief, order & proposed order.	5.0	$	850.00

	DAB	Prepare Orders, review Garaas extra payment calculation.	4.6	$	782.00
1/05/01	SH	Call to Supreme Court re: documents requested by Judge Racek.	0.1	$	7.50
	SJS	Prepare for and attend closing; draft letter to J. Garaas.	4.5	$	765.00
1/12/01	SJS	Telephone conference with D. Garaas; telephone conference with client.	0.3	$	51.00
1/17/01	SJS	Review TAG motion; telephone conference with client.	0.4	$	68.00
1/18/01	SJS	Draft letter brief re: motion to deposit funds.	0.4	$	68.00
1/19/01	SJS	Revise, file and serve letter brief on depositing checks; research motion for damages.	0.6	$	102.00
1/25/01	SJS	Review correspondence from J. Garaas; review correspondence from P. Miller; draft letter to client.	0.3	$	51.00
1/26/01	SJS	Review recusal notice; telephone conference with scheduling clerk; draft letter to client.	0.3	$	51.00
2/01/01	SJS	Review correspondence and motion for J. Garaas.	0.2	$	34.00

2/05/01	SJS	Review Garaas letter to supreme court; draft letter brief in response to motion to vacate; revise affidavit of identification.	1.7	$	289.00
2/06/01	SJS	Research draft, serve and file letter brief in response to motion to vacate.	1.9	$	323.00
2/09/01	SJS	Review Supreme Court order; draft order to client.	0.1	$	17.00
2/12/01	SJS	Review court order; telephone conference with client; draft letter to client.	0.2	$	34.00
2/13/01	SJS	Review TAG reply brief and draft letter to client.	0.4	$	68.00
2/14/01	SJS	Prepare for and attend hearing on defendants' motions.	1.2	$	204.00
	JRB	Calculate balances due on judgment; telephone call from and to title company regarding same; draft letter to title company regarding amounts due, filing satisfactions, etc.	0.3	$	51.00
	JRB	Review checks from Bremer Bank; forward same to client; draft satisfactions of $90 cost and $3500 federal and state court judgments; file same.	0.5	$	85.00

2/21/00	SJS	Research damage claim for failure to convey; telephone conference with J. Lyngstad.	4.9	$	833.00
2/22/01	SJS	Research motion on damages; telephone conference with client regarding the same.	1.0	$	170.00
2/27/01	SJS	Research motion on fees for frivolous claims; telephone conference with J. Lyngstad.	1.2	$	204.00
2/28/01	RJJ	Office conference with Sid Spaeth	0.2	$	15.00
2/28/01	RJJ	Locate R. Allan Rostad	0.2	$	15.00
	RJJ	Call to Mr. Rostad confirming that he is the correct Mr. Rostad	0.3	$	22.50
	DAB	Review materials re: Rostad and Richards, office conferences Sid Spaeth regarding damages.	0.6	$	102.00
	SJS	Review appeal papers from TAG; telephone conference and communications with client; conference with Dan Bueide regarding damages issue; draft letter to Rostad and Richards regarding deeds.	1.6	$	272.00
	JRB	Telephone call from client regarding damage issue	0.2	$	34.00
3/01/01	SJS	Research & draft damages motion.	0.6	$	102.00

3/02/01	SJS	Review correspondence from court re: appeal; draft statement of costs & disbursements and affidavit of identity; prepare brief on motion for damages.	2.1	$	357.00
3/05/01	SJS	Review correspondence from Supreme Court.	0.1	$	17.00
3/06/01	SJS	Draft brief for damages.	1.5	$	255.00
3/07/01	SJS	Telephone conference with R. Lyngstad re: motion for damages; draft Sid Spaeth affidavit and exhibits; draft brief.	2.9	$	493.00
3/08/01	SJS	Telephone conference with client re: motion for damages; draft brief for damages.	1.8	$	306.00
3/15/01	SJS	Review correspondence from Supreme Court; draft letter to client.	0.1	$	17.00
3/16/01	SJS	Telephone conference with J. Lyngstad.	0.1	$	17.00
3/19/01	SJS	Review correspondence from Supreme Court; draft letter to client; telephone conference with J. Lyngstad regarding damages issue; draft brief on damages.	2.8	$	476.00
3/20/01	JRB	Telephone call from and to client; conference with Sid Spaeth regarding damages.	0.2	$	34.00

	SJS	Draft and revise brief on damages; telephone conference with client.	1.8	$	306.00
3/21/01	SJS	Telephone conference with J. Lyngstad and Jon Brakke; draft and research new section of brief on damages.	3.2	$	544.00
3/21/01	JRB	Telephone conference with client regarding damages.	0.4	$	68.00
3/22/01	DAB	Conference John and Rob, office conference Sid Spaeth.	0.4	$	68.00
	SJS	Draft and revise brief for damages; draft affidavit and compile exhibits; draft motion; draft proposed order; telephone conference with client.	4.3	$	731.00
3/23/01	SJS	Revise and edit brief, motion, affidavit and order; arrange service and filing.	2.0	$	340.00
3/26/01	SJS	Review transcript.	0.4	$	68.00
3/27/01	SJS	Review transcripts.	0.5	$	85.00
3/29/01	SJS	Review correspondence from court.	0.1	$	17.00
4/10/01	SJS	Review TAG brief.	0.8	$	136.00
4/11/01	SJS	Prepare for and attend hearing.	2.6	$	442.00
4/23/01	SJS	Review TAG appellate brief; draft response brief.	6.1	$	1,037.00

4/24/01	SJS	Research and draft appellate brief.	7.6	$	1,282.00
4/25/01	SJS	Draft appellate brief.	3.6	$	612.00
4/27/01	SJS	Draft research and revise appellate brief.	4.2	$	714.00
4/30/01	SJS	Revise and edit brief.	3.7	$	629.00
5/01/01	SJS	File and serve brief; research and draft partial judgment.	2.1	$	357.00
5/02/01	SJS	Revise, serve and file judgment; telephone conference with client.	0.6	$	102.00
5/04/01	SJS	Review TAG's opposition to partial judgment; review correspondence from S. Court; telephone conference with client.	0.4	$	68.00
5/11/01	SJS	Review correspondence from Supreme Court; correspondence with client; review motion to strike brief.	0.9	$	153.00
5/16/01	SJS	Review reply brief; review correspondence from Supreme Court; telephone conference with Supreme Court; telephone conference with client; draft response to motion to strike brief.	2.9	$	493.00
5/18/01	SJS	Telephone conference with E. Haaland re: judgment.	0.2	$	34.00

5/24/01	SJS	Review correspondence from Supreme Court; draft letter to Supreme Court.	0.2	$	34.00
5/25/01	SJS	Review Supreme Court Order; draft letter to client.	0.2	$	34.00
6/05/01	SJS	Prepare for oral argument.	3.8	$	646.00
6/06/01	SJS	Prepare for oral argument; travel and return from Bismarck; oral argument.	9.4	$	1,598.00
7/16/01	SJS	review correspondence and judgment form [sic] Supreme Court; telephone conference with client; draft letter to client; draft letter to D. Garaas; revise letter to D. Garaas; review Rule 11 requirements.	2.0	$	340.00
7/17/01	SJS	Conference with D. Bueide; phone conference with client.	0.3	$	51.00
		TOTAL FEES			**$48,642.00**